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IN THE

Supreme Court of the United States

October Term, 1959

No. 342

HOWARD L. NOSTRAND and MAX SAVELLE, *Appellants*,

v.

THOMAS BALMER, HAROLD S. SHEFELMAN, DOROTHY BULLITT, ALBERT B. MURPHY, ROBERT J. WILLIS, JOHN L. KING and JOSEPH DRUMHELLER, as the Board of Regents of the University of Washington; CHARLES E. ODEGAARD, President, University of Washington, and JOHN J. O'CONNELL, Attorney General, State of Washington, *Appellees*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

APPELLANTS' OPENING BRIEF

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

APPELLANTS' OPENING BRIEF

Opinions Below

The Trial Court did not render an official or unofficial opinion. The opinion of the court below (R. 13 et seq.) is reported in 53 Wn.(2d) 460, 335 P.(2d) 10.

Jurisdiction

This is an appeal from a decision of the highest court of the State of Washington which decision sustained the validity of Chapter 377, Laws of Washington of 1955, (with the exception of Section 3) under the United States Constitution. The judgment of the court below was dated March 20, 1959 (R. 12). Notice of Appeal to

the Supreme Court of the United States was filed May 28, 1959 (R. 50). Time for docketing the case was extended to August 30, 1959, by stipulation and Order of the Chief Justice of the Supreme Court of Washington, on July 16, 1959, (R. 53-55). The record was filed with this court and the case docketed on August 24, 1959. Appellees moved to dismiss the appeal primarily on the ground that most of the questions sought to be reviewed were not properly raised or passed on by the court below and that the balance of the questions sought to be reviewed did not present any substantial federal question. On October 26, 1959, this Court noted probable jurisdiction (R. 55).

Jurisdiction of this Court has been invoked pursuant to 28 U.S.C., Sec. 1257 (2), *Wieman v. Updegraff*, 344 U.S. 183, 73 S.Ct. 215, 97 L.ed. 216 (1952) and *Slochower v. Board of Education of N. Y.*, 350 U.S. 551, 76 S.Ct. 637, 100 L.ed. 692 (1955).

Constitutional Provisions and Statutes Involved

The statute drawn into question on the ground that it is repugnant to the United States Constitution is Chapter 377, Laws of Washington 1955 (Revised Code of Washington, Sections 9.81.070 through 9.81.083) and is set out in full in Appendix A hereto. The most pertinent parts of this chapter are as follows:

> Sec. 1. "Every person and every board, commission council, department, court or other agency of the State of Washington or any political subdivision thereof, who or which appoints or employs or supervises in any manner the appointment or employment of public officials or employees . . .

shall require every employee . . . to state under oath whether or not he or she is a member of the Communist Party or other subversive organization, and refusal to answer *on any grounds* shall be cause for immediate termination of such employee's employment . . ." (R.C.W. 9.81.070) (Emphasis supplied)

Sec. 4. "The Communist Party is a subversive organization within the purview of R.C.W. 9.81 and membership in the Communist Party is a subversive activity thereunder." (R.C.W. 9.81.083)

This Chapter has reference to and is defined by other sections of R.C.W. 9.81 which statutory provisions are lengthy and are therefore set forth in Appendix A hereto, together with all of Chapter 377.

The full texts of the United States Constitution that are involved in this appeal are set forth in Appendix B hereto attached. The citations are as follows:

U. S. Const., Section 10, Article I

U. S. Const., First Amendment

U. S. Const., Fourteenth Amendment, Section 1

Questions Presented for Review

The following questions are presented by this appeal:

1. Does the State's requirement of an oath pursuant to Section 1, Chapter 377, Laws of the State of Washington of 1955, of non-membership in the Communist Party or other subversive organization as a condition for state employment violate the Fourteenth Amendment to the United States Constitution in that it requires automatic discharge of a state employee solely upon his re-

fusal to subscribe the oath and no hearing is afforded the employee at which he can explain or defend (a) the reason, nature or basis of his membership in the Communist Party, or other subversive organization; or (b) the reason or basis for his failure or refusal to take such oath?

2. Does such oath requirement violate the Fourteenth Amendment to the Constitution of the United States in that it conclusively presumes that membership in a subversive organization is by itself grounds for dismissal of a State employee?

3. Does such oath requirement violate the Fourteenth Amendment to the Constitution of the United States in that it penalizes a State employee for membership in the Communist Party even in absence of his knowledge that the Communist Party has for its purpose the violent overthrow of the government?

4. Does such oath requirement violate Section 10, Article I, of the Constitution of the United States in that it constitutes a Bill of Attainder?

5. Does such oath requirement violate the First and Fourteenth Amendments to the Constitution of the United States in that it abridges freedom of speech, freedom of association and assembly?

Statement of the Case

The facts are not in dispute, the allegations of the Complaint were found true by the trial court (R. 8-10) and no exception was taken to such Findings.

The appellants are two full professors, one of History and the other of Romance Languages, employed under contract by the State of Washington to teach at the University of Washington (R. 8). Through their employment contracts and pursuant to statute and Rules and Regulations of the University, appellants have certain tenure rights and certain retirement benefits. The appellees, the University Board of Regents, President and Vice-President and the State Attorney General are charged with the duty of establishing, enforcing, carrying out and administering the provisions of Chapter 377, Laws of 1955, (R. 8-9).* The appellees have demanded that appellants sign and swear to an oath, a copy of which appears as Appendix C hereto (R. 5-6). The appellants in their Complaint alleged that unless they comply with such demands, their employment contracts with the University will be terminated as required by Chapter 377 (R. 2, 14).

The Complaint alleges that the terms, provisions and requirements of Chapter 377, Laws of 1955 and the oath are in violation of appellants' rights, privileges and immunities under the Constitution of the United States in the following particulars:

> (1) They violate the rights guaranteed under the First Amendment as made applicable to the States by the Fourteenth Amendment;

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*Because incumbents in the various offices have changed from time to time during the course of this litigation, the names of the appellees have been changed by stipulation and order to accord with the facts.

(2) They violate the rights guaranteed under the Fifth Amendment as made applicable to the States by the Fourteenth Amendment; (this is not asserted on this appeal)

(3) They deprive the appellants of their rights without due process of law and deny them the equal protection of the laws as guaranteed by the Fourteenth Amendment; and

(4) They constitute a Bill of Attainder contrary to Article I, Section 10.

The complaint also alleged that the Act and the oath e in violation of the State Constitution corresponding th the similar Federal Constitutional provisions but the ate Constitutional issues are not raised in this appeal.

The federal questions first raised in the complaint ere the primary issues at all stages of the proceeding the trial court and the State Supreme Court. Although ppellees' Answer (R. 6-7) raised some factual issues, ese issues were resolved in favor of the appellants in bstantially the same terms as were alleged in the com-laint (R. 8-10). The trial court found that Section 4 Chapter 377 violated the State Constitution in that embraced a subject not set forth in the legislative title, nd that Section 3 of Chapter 377, which declares "sub-ersive" all organizations on the U. S. Attorney General's st of subversive organizations, was an unconstitutional elegation of legislative authority (R. 10). That court eld that Sections 1 and 2 were inseparable from Sections and 4 and that therefore all of Chapter 377 was un-onstitutional and void (R. 10). An injunction was issued estraining the enforcement of the provisions of Chapter

377 (R. 11). From this injunction the appellees appealed to the State Supreme Court (Tr. 35). That court after briefs and argument held that Section 3 was unconstitutional but upheld the constitutionality and separability of Sections 1, 2 and 4 (R. 12). Due to a temporary and later a permanent injunction, issued by the trial court, appellees have made no efforts to enforce the provisions of this chapter with reference to the appellants. This final injunction is still in force pending this appeal (Tr. 82-83).

Summary of Argument

1. The oath requirement (Section 1 of Ch. 377, 1955, Laws of Washington) denies appellants' both procedural and substantive due process of law. Procedurally, as state employees, they are subject to being discharged from their positions summarily and automatically without opportunity for hearing or explanation, if they refuse "on any grounds" to execute the disclaimer oath. Substantively the oath requirement assumes that membership in a "subversive organization" is conclusive proof of unfitness for state employment. Moreover as interpreted by the court below, the individual's knowledge of the subversive nature of the Communist Party is presumed conclusively by reason "common knowledge."

2. The statute and the oath are invalid as constituting a bill of attainder. Prior to the decision in *American Communications Association v. Douds*, 339 U.S. 382, 70 S.Ct. 674, 94 L.ed. 925 (1950) there would have been little question that the proscription by the legislature of members of the Communist Party would have

been considered as within the constitutional inhibition against bills of attainder. In *Douds*, the court avoided this result by finding that, absent ex post facto operation, the law under scrutiny was not an attainder. We submit that the requirement of ex post facto application is in error in the light of the origins of the constitutional provision and the decisions of this court.

3. The statute and the oath abridge the First Amendment freedoms as incorporated in the Fourteenth Amendment. The First Amendment protects the right of association and to remain silent. The guarantees of the First Amendment can be restricted only to prevent grave and immediate dangers which the state may lawfully protect. There is no demonstrated "clear and present danger" of any substantive or substantial evil with which the state may deal.

Argument

I

THE OATH VIOLATES DUE PROCESS

A. Automatic and Summary Discharge Without Opportunity for Hearing

Section 1 of Chapter 377, Laws of the State of Washington 1955 (R.C.W. 9.81.070, the statute under scrutiny) provides that refusal to execute the anti-subversive oath "*on any grounds* shall be cause for *immediate termination* of such employee's employment." R.C.W. 9.81.060 provides that no subversive person as defined in the Act, shall be eligible for employment by the State or political subdivision. These two sections mean that no matter what reason an employee has for belonging to a "subversive organization," nor what is the nature of his association therewith or the purpose thereof nor why he is unable or unwilling to execute the oath, he is subject to immediate and automatic discharge without any opportunity to be heard or to explain.

If there were no possible explanation or defense for a refusal to execute the oath or for affiliation with a subversive organization, then it might be said that hearing and notice would be unnecessary because such refusal or affiliation would be an inevitable concommitant of unfitness or disloyalty. It takes little imagination, however, to picture a number of situations which would cause an employee to refuse to sign this oath, which situations would in no way reflect on the employee's loyalty or fitness for the job. The employee might be associated with

a subversive organization for counter-espionage purposes in connection with either governmental or patriotic organizations. He might belong for the purpose of sociological study of "fringe organizations" or to satisfy his personal intellectual curiosity as to the functioning of such organizations, or he might belong solely to get the benefits from the wholly lawful aims of the organization or to assist in such lawful aims, while eschewing its disloyal aims. Cf. *Bridges v. Wixon*, 326 U.S. 135, 65 S.Ct. 1443, 89 L.ed. 2103 (1945).

In none of these situations would his membership reflect in the slightest degree on his loyalty or on his fitness for employment. Thus, even knowing membership in a subversive organization may be innocent in the sense that it involves neither a guilty mind nor a danger to the state. And yet his membership would either (1) be the basis for his refusal to take the oath and thus incur immediate dismissal from State employment under Section 1 or (2) would require a statement under oath that he is a member of the subversive organization which in turn would disqualify him for public employment pursuant to R.C.W. 9.81.060.

Moreover, by now it has been clearly demonstrated that such a "disclaimer oath" is exceedingly offensive to a large and respectable segment of our citizenry. A number of universities have refused substantial student scholarship grants under the National Defense Education Act of 1958 solely because this Act requires a student-applicant to execute an oath very similar to the oath prescribed

by the Washington State Statute.[1] Both individually and through such representative organizations as the Association of American Colleges, the Association of American Universities, the American Association of Land Grant Colleges and State Universities, the National Association of State Universities, the American Association of University Professors, and the Association for Higher Education of the National Education Association, the colleges and universities of the United States have vehemently protested this affidavit requirement in the National Defense Education Act and have urged its repeal.[2] If the taking of an oath such as the one under scrutiny is so deeply offensive to such an important segment of our society, it is reasonable to assume that the Washington disclaimer oath will be refused by at least some loyal and worthy citizens because of its offensive and insulting nature. And yet, such a refusal "on any grounds" shall be cause for "immediate termination" of employment. No opportunity is afforded a State employee to explain or defend his failure to execute the oath or his affiliation with a subversive organization.

In *Slochower v. Board of Education of New York*, 350 U.S. 551, 76 S.Ct. 637, 100 L.ed 692 (1955) it was pointed out that, even though "a person does not have

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[1]Yale University, Harvard University, Princeton University, Oberlin College and twelve other colleges have refused such grants for this reason. Hearings before the Subcommittee on Education of the Senate Committee on Labor and Public Welfare, April 29 and May 5, 1959. See also "Loyalty": An Issue of Academic Freedom by A. Whitney Griswold, Cong. Rec, Jan. 11, 1960, Appendix p. A111 to A113.

[2]See Hearings before the Subcommittee on Education of the Senate Committee on Labor and Public Welfare, April 29 and May 5, 1959.

a constitutional right to government employment," his dismissal "must comply with reasonable, lawful, and non-discriminatory terms." p. 555. In the majority opinion in that case, Mr. Justice Clark stated:

> "*Adler v. Board of Education*, 342 U.S. 485, 96 L.ed. 517, 72 S.Ct. 380, 27 ALR (2d) 472, upheld the New York Feinberg Law which authorized public school authorities to dismiss employees who, *after notice and hearing*, were found to advocate the overthrow of the Government by unlawful means, or who were unable to explain satisfactorily membership in certain organizations found to have that aim. Likewise, *Garner v. Board of Public Works*, 341 U.S. 716, 720, 95 L.ed. 1317, 1322, 71 S.Ct. 909, upheld the right of the City to inquire of its employees as to 'matters that may prove relevant to their fitness and suitability for public service,' including their membership, past and present, in the Communist Party or the communist political association." (Emphasis supplied)

In both *Adler* and the *Garner* cases, the employee was afforded an opportunity for a hearing at which he could explain his position and defend himself from any implications of disloyalty or unfitness.

Later, at page 559, the Court continued:

> "This is not to say that Slochower has a constitutional right to be an associate professor of German at Brooklyn College. The state has broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show Slochower's continual employment to be inconsistent with a real interest of the State. But there has been no such inquiry here. *We hold that the summary dis-*

missal of appellant violates due process of law." (Emphasis supplied)

The oath requirement in the case at bar is as arbitrary and therefore unconstitutional as was the charter provision struck down in Slochower, for here, as there, "the questions asked (the oath required) are taken as confessed and made the basis of discharge." (*Slochower* at page 558.)

In the case at bar the State Supreme Court sought to uphold this statutory requirement on the ground that it constitutes an investigation of the qualifications (including loyalty) of state employees (R. 36). However, this very definitely is not an investigation but is an arbitrary prerequisite for obtaining or continuing to hold state employment. The automatic and summary manner of dismissal points up the conclusion that this requirement is not an inquiry into the fitness of the employee or into his loyalty, but is a purely punitive step to penalize those who will not or cannot take the disclaimer oath.

This requirement might exclude some disloyal or otherwise unfit employees, but at the same time it would also exclude loyal and fit employees without recourse or an opportunity to show their loyalty and fitness. Since indiscriminate classification of innocent with knowing activity offends due process, *Wieman v. Updegraff*, 344 U.S. 183, 73 S.Ct. 215, 97 L.ed. 216 (1952), an opportunity must be afforded the employee to prove his innocence despite membership in a subversive organization or refusal to take the oath. Such an opportunity is

not only lacking but is expressly prohibited by the use of the words "on any grounds" in the statute.

The Court below relies on *Lerner v. Casey*, 357 U.S. 468, 78 S.Ct. 1311, 2 L.ed.(2d) 1423 (1958); *Beilan v. Board of Education*, 357 U.S. 399, 78 S.Ct. 1317, 2 L.ed.(2d) 1414 (1958); *Adler v. Board of Education*, 342 U.S. 485, 72 S.Ct. 380, 96 L.ed. 517 (1952), and *Garner v. Board of Public Works*, 341 U.S. 716, 71 S.Ct. 909, 95 L.ed. 1317 (1951), to support its holding. Each of these cases involved hearings at which the employee could appear and argue his cause. When there is a hearing, the basis of an employee's failure to answer questions as to beliefs and associations can be shown, and his refusal thereby may become reasonably related to the question of his fitness as an employee. The hearing can therefore reasonably be termed an investigation of the qualifications of the employee. The *Adler* case emphasized that the right of the state was to "screen the officials, teachers and the employees as to their fitness to maintain the integrity of the schools as a part of the ordered society." p. 493. The opinion goes on specifically to discuss the question of procedural due process, p. 495:

> ". . . Disqualification follows therefore as a reasonable presumption from such membership and support. *Nor is there here a problem of procedural due process. The presumption is not conclusive but arises only in a hearing where the person against whom it may arise has full opportunity to rebut.* The holding of the Court of Appeals below is significant in this regard:

"'The statute also makes it clear that . . . proof of such membership "shall constitute prima facie evidence of disqualification" for such employment. But, as was said in *Potts v. Pardee* (220 NY 431, 433, 116 NE 78, 8 ALR 785, 17 NCCA 427): "The presumption growing out of a prima facie case . . . remains only so long as there is no substantial evidence to the contrary. When that is offered the presumption disappears and, unless met by further proof, there is nothing to justify a finding based solely upon it." Thus the phrase "prima facie evidence of disqualification," as used in the statute, imports a hearing at which one who seeks appointment to or retention in a public school position shall be afforded an opportunity to present substantial evidence contrary to the presumption sanctioned by the prima facie evidence for which subdivision 2 of Section 3022 makes provision. Once such contrary evidence has been received, however, the official who made the order of ineligibility has thereafter the burden of sustaining the validity of that order by a fair preponderance of the evidence. (Civil Service Law §12 subd. [d]). Should an order of ineligibility then iss[illegible] the party aggrieved thereby may avail himself of the provisions for review prescribed by the section of the statute last cited above. In that view there here arises no question of procedural due process.' 301 NY 476, at p. 494, 95 NE (2d) 806, at 814, 815." (Emphasis added)

Both the *Beilan* case and the *Lerner* case emphasize the fact that there had been a finding of "incompetency" and of "doubtful trust and reliability" respectively. These

findings were reached after hearings and in each case the discharging authority disclaimed any inference of disloyalty on the part of the discharged employee. In the instant case there is no provision or opportunity for a hearing and there is no provision for a finding of disloyalty or unfitness prior to discharge. The discharge is automatic and immediate and without a semblance of procedural due process.

It is significant that the opinion of the court below in the case at bar, failed to discuss, distinguish or even to refer to this Court's holdings in the following cases, although these cases were cited to the Court and discussed extensively by the appellants herein in their brief: *Slochower v. Board of Education, supra; Konigsberg v. State Bar of California,* 353 U.S. 252, 77 S.Ct. 722, 1 L.ed.(2d) 810 (1957); *Schware v. Board of Bar Examiners,* 353 U.S. 232, 77 S.Ct. 752, 1 L.ed.(2d) 796 (1957), and *Sweezy v. New Hampshire,* 354 U.S. 234, 77 S.Ct. 1203, 1 L.ed.(2d) 1311 (1957). It is suggested that this failure was due to an unwillingness to recognize any constitutional limitations whatsoever upon the State's power and method of discharging its employees or of dealing in the area of loyalty inquiries. Appellants acknowledged that the state has the right to see to it that its employees are loyal, fit for their jobs, and are not attempting to excite revolution against the state. But Section 1 of Chapter 377 of the Laws of the State of Washington bears no reasonable relationship to such power and deprives the State employees of their liberty and property without due process of law.

B. Membership in a Subversive Organization is Made Conclusive Proof of Unfitness for State Employment.

In *Konigsberg v. State Bar of California*, 353 U.S. 252, 77 S.Ct. 722, 1 L.ed.(2d) 810 (1957), this Court held that where, in a hearing before a Board of Examiners, an applicant for admission to the bar consistently refused to answer questions relating to his present and past affiliation with the Communist Party, the Board and the Appellate Court were without a basis for their finding that there was reasonable doubt as to his character or his loyalty and were not warranted in denying him admission to the state bar. In *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.ed.(2d) 796 (1957), this Court held that past membership in the Communist Party was not an adequate basis for concluding that an applicant to the bar was disloyal or a person of bad character. These two cases, at their very least, stand for the proposition that, before the state can deprive a man of his livelihood, there must be a showing that reasonably tends to indicate his disloyalty or unfitness. Certainly Konigsberg's refusal to answer the many questions concerning his then present membership or non-membership in the Communist Party was at least as strong a basis for presuming disloyalty or unfitness for the bar as a refusal to sign the oath required by the Washington statute, which oath is not made at a hearing before a board of inquiry but is executed in a vacuum as an absolute prerequisite to retaining state employment.

In the case at bar, the statute proscribes and punishes not disloyalty or subversive activities but mere member-

ship. While it may be conceded that many members of subversive organizations are disloyal and hence unfit, the statute under inquiry would have it that every knowing member of a subversive organization, no matter what the basis or purpose or reason for his membership, is disloyal and unfit, conclusively and in all situations. It is thus an indiscriminate and unreasonable classification having an insufficient rational connection with disloyalty or unfitness to warrant denial of public employment. For, as stated in Section I.A. above, even a knowing membership in the subversive organization may be innocent in the sense that it involves neither a guilty mind nor a danger to the state. If it be accepted that a knowing membership in a subversive organization can be innocent, then classifying such membership indiscriminately with dangerous membership or membership for a disloyal purpose is an assertion of arbitrary power to the same degree as that held unconstitutional in *Wieman v. Updegraff*, 344 U.S. 183, 73 S.Ct. 215, 97 L.ed. 216 (1952). In that case this court struck down a "test oath" as applied to a state college professor on the ground that the oath applied conclusively to both knowing and unknowing membership in the prescribed organization (p. 191):

> "Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process . . . We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a

statute is patently arbitrary and discriminatory."

It must be remembered that the proscribed affiliation is not solely with the Communist Party, but also with any organization that fits the fairly general statutory description of a "subversive organization."

In *Schneiderman v. United States*, 320 U.S. 118, 87 L.ed. 1796, 63 S.Ct. 1333 (1943) this Court reversed an order of denaturalization which was based primarily on the appellant's association with the Communist Party, saying (p. 136):

> "At this point it is appropriate to mention what will be more fully developed later—that under our traditions, beliefs are personal and not a mere matter of association, and that men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles."

To say that "communists in the State of Washington operate under, and undeviatingly follow, policies laid down for them by the Soviet Government" (T. 39) may be true as a generalization. But to go from that generalization to imputing all the organization's beliefs to a specific John Doe because of his mere membership in the organization not only flies in the face of our experience among men and organizations, but is in direct conflict with our basic judicial and political traditions. If membership alone can be made conclusive evidence of evil acts, there is no reason why residence in certain defined areas cannot be made conclusive evidence of criminal acts, or the use of a certain jargon or patois proof of delinquency or perhaps even "subversion."

A recent decision in an analogous situation is the case of *City of Seattle v. Ross*, 154 Wash. Dec. (Adv. Sh.) 794, 344 P.(2d) 216 (1959) in which a person was convicted under an ordinance making it "unlawful for anyone . . . to frequent, enter, be in or be found in a place where narcotics are unlawfully used, kept or disposed of." The Washington Supreme Court interpreted this ordinance as establishing a conclusive presumption of guilt from the mere fact of the defendant's presence in such a place, and held that, because it afforded the defendant no opportunity to explain his presence, it constituted an abuse of the police power of the city. While conceding that if every person found in proximity to illegally kept narcotics were arrested, a considerable number of drug addicts and traffickers would meet their just punishment, the Court went on to say:

> "By the same token, if every child in a city beset with a problem of juvenile delinquency were confined to an institution, that problem would be eliminated. The Chinese, we are told, for a long time held the firm conviction that the only way to roast a pig was to put it in a family home and burn it. Both they and we, it is hoped, have long since learned that, with industry and the exercise of imagination and reason, the prize can be had without the sacrifice."

The Court held that there was not a sufficiently close rational connection between the defendant's presence in a narcotics resort and the evil aimed at, to-wit, drug traffic, to warrant a conclusive presumption, even though the ordinance, if enforced would almost inevitably catch and

punish some of the people and activities at which it was aimed. Cf. *Manley v. Georgia*, 279 U.S. 1, 73 L.ed. 575, 49 S.Ct. 215 (1929); *Tot v. United States*, 319 U.S. 463, 87 L.ed. 1519, 63 S.Ct. 1241 (1943).

So, in the instant case, the conclusive presumption of guilt by reason of membership in a subversive group would undoubtedly net some subversives but would also net and punish many completely innocent persons.

It must be borne in mind that the effect of this statute threatens not only to cut off appellants' livelihoods, terminate their tenure rights and affect their retirement benefits (T. 8), but also to injure and even destroy their standing in the community. For, as was stated in *Wieman v. Updegraff*, *supra*, at p. 191:

> "There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy. Especially is this so in time of cold war and hot emotions when 'each man begins to eye his neighbors as a possible enemy.' . . ."

The fact that the oath requirement was actually intended by the Legislature as punishment rather than as a selective process is strongly indicated by the statutory termination of state employment upon refusal to execute the disclaimer oath "on any grounds." It is thus a punishment without regard to guilt, punishing the innocent along with the guilty on the basis of association alone. As such it offends due process.

C. No Scienter Requirement as to Membership in the Communist Party.

Prior to 1955 the Washington Subversive Activities Act specifically required knowledge of the revolutionary purposes of an organization, before one could be found to be a subversive person through membership. R.C.W. 9.81.010 (5). Section 4 of the 1955 Act specifically eliminated scienter (i.e., knowledge of the revolutionary nature of the organization as distinguished from knowledge of his membership in the organization) from the definition of a subversive person *vis a vis* membership in the Communist Party.

In its opinion, the court below stated that it interpreted the oath as implying scienter of the subversive character of a subversive organization in every clause thereof and of the pertinent statutory provision (R. 35). Shortly before this statement, however, the court said:

> "Even prior to the commencement of hostilities in Korea in 1950, numerous judges had recognized the communist party as a part of a world conspiracy having as its prime objective the overthrow of the United States government by force and violence, or whatever means possible, constitutional or otherwise . . . We can, and do now, hold likewise, *because the fact that the communist party is a subversive organization is now a matter of common knowledge.*" (R.32-33) (Emphasis supplied)

The Court seems to say that specific knowledge of the Communist Party's purposes and activities is universal and is therefore to be conclusively presumed. This negatives any possibility of innocent membership in the Com-

munist Party. It is submitted that this presumption is, therefore, contrary to the specific holding in *Wieman v. Updegraff*, 344 U.S. 183, 73 S.Ct. 215, 97 L.ed. 216 (1952).

II

THE OATH REQUIREMENT IS VOID AS A BILL OF ATTAINDER

A. The Test of Attainder

The oath under consideration is not an oath of allegiance; it is not a pledge of adherence to the Constitution of the United States and of the State of Washington. This is a test oath, an expurgatory oath required by the state.

Bills of Attainder were considered by this Court in *Cummings v. Missouri*, 4 Wall. 277, 18 L.ed. 356 (1866), and *Ex parte Garland*, 4 Wall. 333, 18 L.ed. 366 (1866), where test oaths for attorneys, priests, candidates for public office and others who may have aided the South during the Civil War, were held to be Bills of Attainder. In *Cummings, supra*, Mr. Justice Field defined a bill of attainder as:

> ". . . a legislative act which inflicts punishment without a judicial trial . . . (the legislature is) creating the deprivation without any of the ordinary forms and guards provided for the security of the citizen in the administration of justice by the established tribunals."

It will be noted that it *is the elimination of the adjudicatory process which offends the prohibition against*

the bill of attainder, not the fact that the attaint was ex post facto.

Mr. Justice Field continued:

> "We do not agree with the counsel of Missouri that 'to punish one is to deprive him of life, liberty or property, and that to take from him anything less than these is no punishment at all.' The learned counsel does not use these terms—life, liberty and property—as comprehending every right known to the law . . . . The deprivation of any rights, civil or political, *previously enjoyed, may be punishment*," 4 Wal. 320. (Emphasis supplied)

In *Ex parte Garland, supra*, Mr. Justice Miller, though dissenting, defined a bill of attainder (p. 388):

> "I think it will be found that the following comprise those essential elements of bills of attainder in addition to the one already mentioned (corruption of the blood), which distinguish them from other legislation and which made them so obnoxious to the statesmen who organized our government: 1. They were convictions and sentences pronounced by the Legislative Department of government instead of the Judicial. 2. The sentence pronounced and the punishment inflicted were determined by no previous law or fixed rule. 3. The investigation into the guilt of the accused, if any such were made, was not necessarily or generally conducted in his presence or that of his counsel and no recognized rule of evidence governed the inquiry."

This definition was clear and unequivocal. It was followed in *U. S. v. Lovett*, 328 U.S. 303, 66 S.Ct. 1073, 90 L.ed. 1252 (1946). Congress denied pay to named

government employees. Mr. Justice Black wrote the opinion of the court, striking down the legislation as a bill of attainder, "a legislative act which inflicts punishment without judicial trial." (p. 315). This Court held that *Garland* and *Cummings* stand for the proposition "that legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution."

The Court then went on to say:

> "The effect was to inflict punishment without the safeguards of a judicial trial and 'determined by no previous law or fixed rule.' The constitution declares that that cannot be done either by a state or by the United States.
>
> "Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons, because the legislature thinks them guilty of conduct which deserves punishment. *They intended to safeguard the people of this country from punishment without trial by duly constituted courts.*" (Emphasis supplied)

The instant case meets every test laid down by these cases. The Court in the cases cited—concerned with the fact that the adjudication was by the legislature—no issue was made as to whether past, present or prospective conduct was inhibited. The acts were held to be bills of attainder.

Story, in *Commentaries on the Constitution* (5th ed., 1891) Sec. 1344, put it:

> "In such cases, the legislature assumes judicial magistry, pronouncing upon the guilt of the party without any of the common forms and guards of trial, and satisfying itself with proofs, when such proofs are within its reach, whether they are conformable to the rules of evidence or not. In short, in all such cases, the legislature exercises the highest power of sovereignty, and what may be properly deemed an irresponsible despotic discretion, being governed solely by what it deems political necessity or expediency, and too often under the influence of unreasonable fears or unfounded suspicions."

B. Attainder Need Not Be *Ex Post Facto*

Until after the decision in *U. S. v. Lovett, supra*, it was clear that there need be no *ex post facto* features attached to bring the act within the definition of Bill of Attainder, even though the act dealt with often had ex post facto features. *Cummings* and *Garland* could not at the time requested sign the oaths, nor could they in the future—Lovett was being punished simply for being Lovett, present and future. Mr. Justice Frankfurter concurring in *Lovett, supra*, said:

> "There was always a declaration of guilt either of the individual or the class to which he belonged. The offense might be a pre-existing crime or an act made punishable ex post facto. Frequently, a bill of attainder was thus doubly objectionable because of its ex post facto features. This is the historic explanation for uniting the two mischiefs in one

clause—'No Bill of Attainder or ex post facto Law shall be passed.' " 328 U.S. 323.

This observation had a rapid development. The late Chief Justice Vinson in *American Communications Association v. Douds*, 339 U.S. 382, 70 S.Ct. 674, 94 L.ed. 925 (1950), found no attainder because the oaths reached only present beliefs and affiliations so that one "by a voluntary alteration of the loyalties which impel him to action" could become eligible to sign the oath.

Then in *Huntamer v. Coe*; 40 Wn.(2d) 767, 246 P.(2d) 489 (1952), the Supreme Court of Washington held that to constitute a bill of attainder the legislation must be *ex post facto*. The oath there considered involved candidates for public office who were required under the Subversive Activities Act of Washington (Ch. 254, Sec. 16, L. of 1951) to subscribe an oath that the candidate is not a subversive person as defined in the act. Mr. Justice Finley said:

> "(the statute) can and should be interpreted to require an oath of allegiance relating to the present and future; and that in this sense, the legislation should not be characterized as *ex post facto*, or in effect a bill of attainder. If Chapter 254 is susceptible of an interpretation requiring an oath covering and relating to past conduct—political or otherwise—it would in our opinion and under existing authorities be unconstitutional. We believe such an interpretation of the pertinent provisions of Chapter 254 is not mandatory or the only one possible . . . 'In other words, we think the statute in question can and should be interpreted in a present and prospective sense insofar as the requirement of an oath

or affidavit is concerned, and as so interpreted, that it is not unconstitutional, that is, *ex post facto*, or in effect a bill of attainder.' " p. 776.

But in *Cummings v. Missouri*, *supra*, the court was concerned with the present and prospective requirements of the oath. The English case of *Gaines v. Buford*, I Dana 481 (1833), is quoted with approval:

> "A British Act of Parliament might declare that if certain individuals, or a class of individuals, failed to do a given act by a named day, they should be deemed to be, and treated as convicted felons or traitors. Such an act comes precisely within the definition of a bill of attainder, and the English courts would enforce it without indictment or trial by jury. . . . ."

Mr. Justice Field continued:

> "If these clauses . . . had declared that all priests and clergymen within the State of Missouri were guilty of these acts . . . and hence (should) be subjected to the like deprivation, the clauses would be equally open to objection. And, further, if these clauses had declared that all such priests and clergymen should be so held guilty, and be thus deprived, provided they did not by a day designated, do certain specified acts, they would be no less within the inhibitions of the Federal Constitution.
>
> "In all these cases, there would be the legislative enactment creating the deprivation without any of the ordinary forms and guards provided for the security of the citizen in the administration of justice by the established tribunals." p. 324.

We suggest that this Court re-examine the premise of

Douds and Garner: that legislation, which has present and prospective operation is not a Bill of Attainder. Neither history nor logic will support this conclusion.

To the framers of the Constitution the conduct of the American States during the Revolution offered strong and persuasive reasons for including the provision against bills of attainder. Judge Cooley said:

> "The thoughtful reader will not fail to discover, in the acts of the American States during the Revolutionary period, sufficient reason for this constitutional provision, even if the still more monitory history of the English attainders had not been so freshly remembered." I. Constl. Limitations, (8th Ed) 538.

At least two acts of the Pennsylvania Assembly which were bills of attainder had prospective application. In *Respublica v. Gordon*, 1 Dall. (Pa.) 233, 1 L.ed. 115 (1788), the Supreme Court of Pennsylvania stated:

> "The defendant was included in an act of proclamation issued during the late war, and not appearing within the time prescribed, was attainted of treason for adhering to the King of Great Britain, in consequence of which his estate was confiscated to the use of the commonwealth."

An act passed on March 6, 1778, provided for the attainder of various traitors unless they appeared and conformed to the law. *Pemberton v. Hicks*, 3 Dall. (Pa.) 479, 1 L.ed. 687 (1798).

The most atrocious attainder instance in history was prospective. The Great Act of Attainder was passed by the Parliament assembled by James II in Dublin in 1688.

Between two and three thousand persons were attainted, sentenced to death and their property confiscated if they failed to appear at an appointed time. *Macauley's History of England*, Ch. 12 (Standard Library Edition), Vol. V, pp. 213-216. It seems clear to us that these examples must have been fresh in the minds of the authors of the Constitution.

The prohibition against bills of attainder was passed by the Constitutional Convention without debate.

> "In the Convention it was moved by Mr. Gerry and Mr. McHenry that the 'legislature shall pass no bill of attainder or ex post facto law.' Mr. Gouverner Morris thought the precaution as to ex post facto laws unnecessary, but essential as to bills of attainder.
>
> "Mr. Ellsworth maintained that there was no lawyer, no civilian, who would not say, that ex post facto laws were void of themselves. And, therefore, it was unnecessary to prohibit them." 1 Watson, Constitution of the United States, 733-4.

If it was clear that *ex post facto* laws were void of themselves would this then not be true of bills of attainder if they were limited to punishment for past conduct only? And, if bills of attainder were by definition intended only to include punishment for past conduct, why include the provision at all? Surely the prohibition of "ex post facto laws" historically would have been adequate and comprehensive.

Story, in *Commentaries on the Constitution* (5th ed. 1891) Sec. 1345, had this to say:

> "The terms, *ex post facto* laws, in a comprehensive sense, embrace all retrospective laws, or laws governing or controlling past transactions, whether they are of a civil or a criminal nature. And there have not been wanting learned minds, that have contended, with no small force of authority and reasoning, that such ought to be the interpretation of the terms in the Constitution of the United States."

The rationale of distinguishing *Cummings*, *Garland* and *Lovett* as cases punishing individuals for past actions and, therefore, being bills of attainder; and *Douds*, *Garner* and the instant cases as proscribing only future conduct and therefore not coming within the constitutional inhibition, escapes us. Certainly the proscription for the present and in the future is founded upon the legislature's dislike, formed in the past for easily ascertainable members of a group, for their past shortcomings.

> "This, of course, flies in the teeth of the Garland and Lovett cases, in both of which the alleged fault which gave rise to the disqualification was highly pertinent to future conduct. If there is a difference in the legislative intent, the Court can have discovered it only by intuition. But the premise as well as the application seems to be unsound. It means that a completely capricious measure must escape condemnation as a bill of attainder because it is grounded on no offense whatever. If the legislature is forbidden to punish a man for cause, surely it is forbidden to punish a man without cause . . ." *Wormuth, Legislative Disqualification as Bills of*

Attainder, 4 Vand. Law Review 603, at 607.

Wormuth further points out that if to be invalidated a bill of attainder must be *ex post facto*, then legislatures are in no way restrained from putting a man to death by vote, if only his life has been so blameless that he escaped all reproach for past conduct.

One final point must be touched upon in this section of the brief. The legislature, of course, has the right to establish relevant disqualifications for an office or an occupation. First, these disqualifications must have a rational relationship to fitness; *Schware v. Board of Bar Examiners, supra; Konigsberg v. State Bar of California, supra*, and secondly,

> "they cannot be . . . grounded on a legislative determination of fault or culpability in the persons disqualified, but a legislative disqualification so grounded is a bill of attainder. So the *Lovett* case stands for the proposition that the legislature may not apply a valid standard of disqualification to individuals and itself determine their blameworthiness." *Wormuth, supra*, at page 614.

If we assume that the legislature may properly disqualify persons who engage in or advocate, abet, advise or teach the overthrow of the government, it still cannot proscribe members of the Communist Party without permitting them to demonstrate that they abjure the "disloyal" thoughts or beliefs which the legislature has determined are blameworthy. It is this determination of fault by the legislature which offends the Constitution.

III

THE OATH ABRIDGES FREEDOM OF SPEECH, ASSOCIATION AND ASSEMBLY

A. The Right of Association Is Protected by the First and Fourteenth Amendments, and Article I, Sections 4 and 5 of the State Constitution.

Whether the plaintiffs here are members of a proscribed organization or not is beside the point. Freedom of speech is freedom with respect to all speech and encompasses the freedom not to speak—to remain silent. To force an American to publicly profess any statement of belief is to violate the First Amendment. This principle was eloquently expressed by Mr. Justice Jackson, speaking for the majority of the court in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.ed. 1628 (1943), where religious convictions of school children against saluting the flag were sustained:

> "If there is any fixed star in our constitutional constellation it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." U.S. 642.

To associate, to affiliate, even with the Communist Party, is a lawful activity protected by the Constitution.

In *American Communications Assn. v. Douds*, 339 U.S. 382, 413, 414, 70 S.Ct. 674, 94 L.ed. 925 (1950), Mr. Justice Vinson fully recognized that the right of asso-

ciation was protected by the First Amendment, and that it was abridged by virtue of the Anti-Communist oath required of labor union officers, although he found a countervailing interest in the "right of the public to be protected from evils of conduct" to justify the abridgement. The Court said (p. 393):

> "By exerting pressures on unions to deny office to Communists and other identified therein, Sec. 9(h) undoubtedly lessens the threat to interstate commerce, but it has the further necessary *effect of discouraging the exercise of political rights protected by the First Amendment.* Men who hold union offices often have little choice but to renounce Communism or give up their offices. Unions which wish to do so are discouraged from electing Communists to office." (Emphasis supplied)

Mr. Justice Frankfurter in his concurring opinion in *Wieman v. Updegraff*, 344 U.S. 183, 73 S.Ct. 215, 97 L.ed. 216 (1952) *supra*, said (p. 194):

> ". . . Since the affiliation which must thus be forsworn may well have been for reasons or for purposes as innocent as membership in a club of one of the established political parties, to require such an oath, on pain of a teacher's loss of his position in case of refusal to take the oath, penalizes a teacher for exercising a right of association peculiarly characteristic of our people. See Arthur M. Schlesinger, Sr., Biography of a Nation of Joiners, 50 Am. Hist. Rev. 1 (1944), reprinted in Schlesinger, Paths to the Present 23. Such joining is an exercise of the rights of free speech and free inquiry. By limiting the power of the State to interfere with freedom of speech and freedom of association, the

Fourteenth Amendment protects all persons, no matter what their calling."

In case after case this Court has dealt with the right of association as one of the rights protected by the First Amendment: *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 71 S.Ct. 624, 95 L.ed. 817 (1951); *American Communications Assns. v. Douds*, *supra*; *Garner v. Board of Public Works*, 341 U.S. 716, 71 S.Ct. 909, 95 L.ed. 1317 (1951); *United Public Workers v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.ed. 754 (1947); *Thomas v. Collins*, 323 U.S. 516, 65 S. Ct. 315, 89 L.ed. 430 (1945).

B. The Rights Protected by the First Amendment May Not Be Abridged Except to Correct Substantial Evils With Which the Legislature May Have the Power to Deal.

Where state action infringes upon First Amendment rights, that infringement must be directly related to a substantial evil sought to be met by the statute or other action—there must be a "clear and present danger." A statute curtailing or infringing rights of association or rights of speech cannot be punitive or arbitrary. There is no substantial evil toward which the oath in this case is directed.

In *Adler v. Board of Education*, 342 U.S. 485, 72 S.Ct. 380, 96 L.ed. 517 (1952), the court stressed the relationship between the oath and the public interest of protecting school children from subversive propaganda "sufficiently subtle to escape detection in the classroom." In none of these cases does the court allow infringement

of the First Amendment right to associate without first satisfying itself that the nature of the evil perceived by the legislature is of sufficient magnitude to warrant the infringement. These cases go no further; the evil is examined, whether it be in the area of political strikes, education, or public service, and abridgement of the First Amendment is permitted only to the extent of meeting that evil.

In *Danskin v. San Diego Unified School District*, 28 Cal.(2d) 536, 171 P.(2d) 885 (1946), the California Civic Center Act barred the use of school facilities to organizations advocating the overthrow of the United States or of the state by force, violence or other unlawful means, or by persons or organizations affiliated with such organizations (subversive elements). The Act defined "subversive elements" and provided that to determine whether or not the applicant was a "subversive element" the school board could require an oath.

Members and officers of the San Diego Civil Liberties Union, an affiliate of the American Civil Liberties Union filed an application for the use of a school auditorium. The school board granted permission on the sole condition that the applicant subscribe and file the following oath:

> "I . . . . on oath say:
>
> "I am a member of the San Diego Civil Liberties Committee . . . and one of the applicants for the use of (the) auditorium. I do not advocate and I am not affiliated with any organization which advocates or has as its object or one of its objects the

overthrow of the present Government of the United States or of any State by force or violence, or unlawful means."

Mr. Justice Traynor, speaking for the California Supreme Court, held that the oath requirement was unconstitutional, relying upon the fact that, even assuming the organization was "subversive," there was no showing that the use of the auditorium would in any way endanger the safety of the community. He said:

> "Freedom of speech and of peaceable assembly are protected by the First Amendment of the Constitution of the United States against infringement by Congress. They are likewise protected against infringement by state legislatures. *Thomas v. Collins*, 323 U.S. 516, 530, 65 S.Ct. 315, 89 L.ed. 430; *DeJonge v. Oregon*, 299 U.S. 353, 364, 57 S.Ct. 255, 81 L.ed. 278. However reprehensible a legislature may regard certain convictions or affiliations, it cannot forbid them if they present no 'clear and present danger that they will bring about the substantive evils' that the legislature has a right to prevent."

and then continues at page 891:

> "Since the state cannot suppress free expression except in the presence of clear and present danger, it cannot enforce a precautionary measure that would deny the right of assembly to those whose political creeds it disapproves. . . . When one searches deeper for the reason that motivates the prohibition of such meetings there is no escaping the conclusion that the legislature denies access to a forum in a school building to 'subversive elements' not because it believes that their public

meetings would create a clear and present danger to the community, but because it believes the privilege of free assembly in a school building should be denied to those whose convictions and affiliations it does not tolerate. What it does not tolerate it seeks to censor. . . .

"Since the state cannot compel 'subversive elements' directly to renounce their convictions and affiliation, it cannot make such a renunciation a condition of receiving the privilege of free assembly in a school building. Such a condition is . . . unconstitutional."

and at page 893:

"If it is unconstitutional for the state to prohibit certain persons or groups classified as 'subversive elements' from exercising their rights of free speech and assembly at places where others are allowed to speak and assemble it is a *fortiori* unconstitutional to require proof from any persons or groups that they are not subversive elements."

In the case of *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.ed. 1628 (1943) *supra*, the court struck down an oath required of school children:

"To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the state as those we

deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." 319 U.S. 641.

Lawson v. Housing Authority of the City of Milwaukee, 270 Wis. 269, 70 N.W.(2d) 605 (1955), was an attack upon a law requiring tenants in public housing to take a loyalty oath that they are not members of the organizations on the Attorney General's List. The Supreme Court of Wisconsin struck down the oath as violative of the First Amendment of the Constitution and certiorari was denied by the Supreme Court of the United States. The court said (p. 613):

> "The decision in [*Douds*] makes it clear that if Resolution 513 [Loyalty Oath] is to be upheld against the charge that it invades freedoms guaranteed by the First Amendment, it must be upon the basis of computing the threat of danger to the successful operation of public housing projects which might result . . .
>
> "This court deems the possible harm which might result in suppressing the freedoms of the First Amendment outweigh any threatened evil posed by the occupation by members of subversive organizations of units in federally-aided housing projects. We hold the Gwinn Amendment to be unconstitutional and void" (p.615).

It is noteworthy that this Court in *Yates v. United States*, 354 U.S. 298, 77 S.Ct. 1064, 1 L.ed.(2d) 1356 (1957), held that the countervailing interest of the state

which permits abridgement of free speech is the danger of advocacy or teaching of overthrow of the government by force or violence coupled with incitement to illegal action.

The oath in this case not only proscribes advocacy of forcible overthrow, but also advocacy or teaching the "alteration of the constitutional form of the government . . . by revolution . . ." (R. 5).

The word "revolution" does not necessarily mean the use of force or violence, or even illegality. The Washington legislature obviously felt it meant something else, otherwise the words would not have been used in the disjunctive, "by revolution, force or violence." The "industrial revolution" at once comes to mind as a legal "alteration" accomplished by "revolution."

Webster's New International Dictionary, 2nd Edition, defines "revolution" as follows:

> "Change, alteration."
> "A total or radical change, as a *revolution* in thought."
> "A fundamental change in political organization, or in a government or constitution."
> "The overthrow or renunciation of one government or ruler, and the substitution of another by the governed."

It is evident that "revolution" does not necessarily mean force, violence or the use of unlawful means.

By proscribing "alteration" by "revolution," and requiring an oath abjuring such advocacy the state has enacted legislation which "does not aim specifically at

evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press." *Thornhill v. Alabama*, 310 U.S. 88, 97, 84 L.ed. 1093, 60 S. Ct. 736 (1940).

With these principles in mind, we consider the interest which must be balanced. It is clear that academic freedom must occupy a preferred status in our society, and that freedom of expression will be protected against impairment by the state. In *Sweezy v. New Hampshire*, 354 U.S. 234, 77 S.Ct. 1203, 1 L.ed.(2d) 1311 (1957), this Court said:

> "To impose a straight jacket upon the intellectual leaders in our colleges and universities would imperil the future of our nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new majority and understanding; otherwise our civilization will stagnate and die." p. 250.

Justices Frankfurter and Harlan concur:

> "These pages need not be burdened with proof, based on the testimony of a cloud of impressive witnesses, of the dependence of a free society on free universities. This means the exclusion of governmental intervention in the intellectual life of a university. It matters little whether such intervention occurs avowedly or through action that in-

evitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor." p. 262.

"I do say that in these matters of the spirit inroads on legitimacy must be resisted at their incipiency. This kind of evil grows by what it is allowed to feed on. The admonition of this Court in another context is applicable here. 'It may be that it is the obnoxious thing in its mildest and least repulsive form, but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.' *Boyd v. United States*, 116 U.S. 616, 635, 29 L.ed. 746, 752, 6 S.Ct. 524." p. 264.

"For a citizen to be made to forego even a part of so basic a liberty as his political autonomy, the subordinate interest of the state must be compelling." p. 265.

The Court below sought to justify the oath requirement by the state under ". . . the power to protect the students therein against the possible exertion of subversive influence by their teachers or other instructors." (R. 35)

Where is the "clear and present danger" of a "substantial evil?" Certainly it cannot be said realistically that "possible exertion of subversive influence" is a substantial evil which may harm and injure society. To permit proscription of speech on this basis would truly impose a straight jacket upon and stifle intellectual pursuits.

Nor can we perceive a "substantial evil" flowing from

the advocacy or teaching of "revolution" by peaceful means, which the oath proscribes.

CONCLUSION

The decision below should be reversed and the cause remanded with instructions to issue a decree declaring that Chapter 377, Laws of 1955 of the State of Washington violates the Constitution of the United States, and is therefore void and of no effect and a further decree that the appellees herein be permanently restrained from establishing, enforcing, carrying out, and administering the provisions of said Chapter and from requiring appellants to execute any oath pursuant to said Chapter.

Respectfully submitted,

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Attorneys for Appellants

APPENDIX A

Statutes Involved

Chapter 254, Laws of 1951 (R.C.W., Chapter 9.81):

R.C.W. 9.81.010:

"Section 1. Definitions. For the purpose of this chapter:

"(1) 'Organization' means an organization, corporation, company, partnership, association, trust, foundation, fund, club, society, committee, association, political party, or any group of persons, whether or not incorporated, permanently or temporarily associated together for joint action of advancement of views on any subject or subjects.

"(2) 'Subversive organization' means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy, or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or of any political subdivision of either of them, by revolution, force or violence.

"(3) 'Foreign subversive organization' means any organization directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise, or teach, activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form

of the government of the United States, or of the state of Washington, or of any political subdivision of either of them, and to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization, or individual.

"(4) 'Foreign government' means the government of any country or nation other than the government of the United States of America or of one of the states thereof.

"(5) 'Subversive person' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or any political subdivision of either of them, by revolution, force, or violence; or who is a member of a subversive organization or a foreign subversive organization."

R.C.W. 9.81.020:

Section 2 makes certain subversive activities a felony.

R.C.W. 9.81.030:

Section 3 makes it a felony to remain or become a member of a subversive organization or a foreign subversive organization "knowing said organization to be a subversive organization or a foreign subversive organization."

R.C.W. 9.81.040:

Section 4 disqualifies persons who have been convicted or found guilty under Sections 2 and 3 of the Act from holding public office.

R.C.W. 9.81.050:

Section 5 provides for the dissolution of subversive organizations and for disposition of their property.

Section 6 through 8 and Section 10 were vetoed.

R.C.W. 9.81.130:

Section 9 makes provision for the attorney general to report to the governor and to the legislature biennially.

R.C.W. 9.81.060:

> "No subversive person, as defined in this act, shall be eligible for employment in, or appointment to any office, or any position of trust or profit in the government, or in the administration of the business, of this state, or of any county, municipality, or other political subdivision of this state."

R.C.W. 9.81.070 and 9.81.080:

Sections 12 and 13 provide that the board or agency of government shall determine by appropriate rules and regulations and other procedures whether any employee is a subversive person. These sections were carried over into the 1955 Act with amendments by addition, and are set out verbatim *infra.*

R.C.W. 9.81.085:

Section 14 requires employees of the State or any political subdivision thereof to state under oath that he

is not a subversive person as defined in the Act and provides that a person refusing to take the oath or who admits that he is a subversive person shall immediately be discharged. This section has been superseded by the 1955 Act.

R.C.W. 9.81.090:

Section 15 provides for discharge of subversive persons from employment if reasonable grounds on all the evidence exist to believe that the person is subversive. It provides that there must be cause for discharge with notice of charge and hearing under appropriate rules and regulations.

R.C.W. 9.81.100:

Section 16 provides for an affidavit to be filed by a candidate for public office that he is not a subversive person as defined in the law.

R.C.W. 9.81.110:

Section 17 makes misstatements punishable as perjury and provides for a penalty.

R.C.W. 9.81.120:

Section 19 states that nothing in the act is to be construed as authorizing civilian or military censorship or the infringement of freedom of speech or other constitutional guarantees.

By Chapter 142, Laws of 1953, Section 1, subsection (5) of the 1951 Act, defining a "subversive person," was amended to provide that a "subversive person" is one who, "with knowledge that the organization is an organi-

zation, as described in paragraphs two and three hereof, becomes or remains a member * * *."

By Chapter 377, Laws of 1955, this statute was further amended by adding two new sections and amending Sec. 12 (R.C.W. 9.81.010). By this amendment, the entire tenor of the Act has been changed.

"Section 1. Section 12, Chapter 254, Laws of 1951, and R.C.W. 9.81.070 are each amended to read as follows:

R.C.W. 9.81.070. "Every person and every board, commission, council, department, court or other agency, of the State of Washington or any political subdivision thereof, who or which appoints or employs or supervises in any manner the appointment or employment of public officials or employees shall establish by rules, regulations or otherwise, procedures designed to ascertain whether any person is a subversive person. In securing any facts necessary to ascertain the information herein required, the applicant shall be required to sign a written statement containing answers to such inquiries as may be material, which statement shall contain notice that it is subject to the penalties of perjury. *Every such person, board, commission, council, department, court, or other agency, shall require every employee or applicant for employment to state under oath whether or not he or she is a member of the communist party or other subversive organization, and refusal to answer on any grounds shall be cause for immediate termination of such employee's employment or for refusal to accept his*

or her application for employment. (Amendatory language emphasized)

"Section 2. Section 13, Chapter 254, Laws of 1951. and R.C.W. 9.81.080 are amended to read as follows:

R.C.W. 9.81.080. "The inquiries prescribed in preceding sections, other than the written statement to be executed by an applicant for employment *and the requirement set forth in section 1 of this amendatory act, relative to membership in the communist party or other subversive organization,* shall not be required as a prerequisite to the employment of any persons in any case in which the employing authority may determine, and by rule or regulation specify the reasons why, the nature of the work to be performed is such that employment of such persons will not be dangerous to the health of the citizens or the security of the governments of the United States, the state of Washington, or any political subdivision thereof."

R.C.W. 9.81.082. Sec. 3. *"For the purpose of this act, membership in a subversive organization shall be membership in any organization after it has been placed on the list of organizations designated by the attorney general of the United States as being subversive pursuant to executive Order No. 9835."* (Held unconstitutional by court below.)

R.C.W. 9.81.083. Sec. 4. *"The communist party is a subversive organization within the purview of R.C.W. 9.81 and membership in the communist party is a subversive activity thereunder."*

APPENDIX B

Constitutional Provisions Involved

United States Constitution, Art. I, §10:

> "No State shall . . . pass any Bill or Attainder, ex post facto Law, or Law impairing Obligation of Contracts, or grant any Title of Nobility."

United States Constitution, First Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

United States Constitution, Fourteenth Amendment, Section 1:

> ". . . (N)or shall any State deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

APPENDIX C

The Oath

"UW-1006 7/55

"STATE OF WASHINGTON
"OATH FOR ADMINISTRATIVE RESEARCH, AND FACULTY PERSONNEL OF THE UNIVERSITY OF WASHINGTON

Department, office or other agency (Print or type) ..... Title or Position (Print or type) .....

STATE OF .....

COUNTY OF .....

ss. AFFIDAVIT

"I, the undersigned, do solemnly swear (or affirm):

"(1) That I will support the constitution and laws of the United States of America and of the State of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order, and undivided allegiance to the government of the United States;

"(2) That I am not a subversive person or a member of the Communist Party or any subversive organization, foreign or otherwise, which engages in or advocates, abets, advises, or teaches the overthrow, destruction or alteration of the constitutional form of the government of the United States, or of the State of Washington, or of

any political subdivision of either of them, by revolution, force or violence;

"That this statement is voluntarily made by me, pursuant to the provisions of Chapter 377, Laws of 1955, with full knowledge that the same is subject to the penalties of perjury.

.....

(Signature)

"Subscribed to and sworn to (or affirmed) before me this ..... day of ....., 1955, at ....., ...

(City or Place) (State)

.....

Notary Public in and for the State of .....

.....residing at.....

(To be executed in duplicate, one copy to be retained by individual.)"

BRIEF OF APPELLEES

Office Supreme Court, U.S.
FILED
MAR 5 1960
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 342

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In the Supreme Court of the United States

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLEES

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Since chapter 377, Laws of Washington 1955 is amendatory legislation (consisting of only four sections, two of which amend prior sections and two of which add new sections) amending Washington's

basic "Subversive Activities Act" of 1951, chapter 254, Laws of 1951, as amended by chapter 142, Laws of 1953, appellees have collected in the Appendix each of the sections brought into focus in this case, omitting therefrom those sections not pertinent. It is hoped that in this way, this court may more clearly follow these sections from enactment in 1951 through amendment in 1955.

Appellees concede that Article I, § 10, the First Amendment and Fourteenth Amendment, § 1, United States Constitution are involved in this appeal and were considered by the Washington Supreme Court in rendering its decision below, (R. 3, 26, 27-28, 35).

SUMMARY OF ARGUMENT

1. A state statute requiring a present public employee to execute an affidavit that he is not a present, knowing member of the Communist Party or other subversive organization does not constitute a denial of due process simply because it does not provide for a hearing upon the refusal of such employee to execute the affidavit prior to discharge. The state may properly exclude present, knowing members of the Communist Party or other subversive organization from its employ in order to maintain a trustworthy public service and need not afford a hearing to such persons as admit membership in the proscribed organization or refuse to state under oath whether they are such members.

2. The affidavit requirement does not constitute a bill of attainder. It is an employment qualification and not a penalty. Hence, the court should not reach appellants' argument that bills of attainder may be prospective as well as retrospective.
3. The affidavit requirement does not abridge the First Amendment, as incorporated in the Fourteenth Amendment. The interest of the government in having trustworthy public employees in sensitive positions clearly outweighs any limitation on the liberties of such employees, or prospective employees which might result from the affidavit requirement.

I

THE AFFIDAVIT REQUIREMENT DOES NOT VIOLATE DUE PROCESS

A. Appellants' Concessions

Before proceeding to discuss the questions presented by appellants for review, it seems appropriate to point out certain concessions which appellants have made and to point out certain qualifications which should be considered in connection with the questions posed.

1. Sensitive area of employment.

Appellants do not claim that their present employment as professors in the University of Washington is in a "non-sensitive" area. Properly so,

under the decisions of this court in *Adler v. Board of Education*, 342 U. S. 485, 27 A. L. R. (2d) 472 (cf. *Slochower v. Board of Education of New York*, 350 U. S. 551), *Beilan v. Board of Education*, 357 U. S. 399. This follows from the fact that under § 2, chapter 377, Laws of 1955 (RCW 9.81.080) the so-called "loyalty oath"

> "* * * shall not be required as a prerequisite to the employment of any persons in any case in which the employing authority may determine, and by rule or regulation specify the reasons why, the nature of the work to be performed is such that employment of such persons will not be dangerous to the health of the citizens or the security of the governments of the United States, the state of Washington, or any political subdivision thereof."

2. Scienter of organizational purpose.

Appellants appear to have completely abandoned their argument, so strongly urged in the Supreme Court of Washington (Brief of Respondents for the court below, pp. 24 through 43), that either the statute which requires the oath (§ 1, chapter 377, Laws of 1955; RCW 9.81.070) or the form of oath demanded (R. 5) offend due process because of indiscriminate classification of persons having knowledge of the organizational purpose with persons innocent, i.e., lacking knowledge of such purpose (cf. *Wieman v. Updegraff*, 344 U. S. 183). Appellants' argument to the court below was rejected with respect to both the statute involved (R. 20) and the

form of oath (R. 35) and does not appear to be involved herein. Rather, as will be later shown, appellants raise new and different arguments concerning "scienter" not presented to the Washington Supreme Court.

In considering the questions presented, three vitally significant factors must be borne in mind:

a. That the affidavit, negating membership in the Communist Party or other subversive organization is required only with respect to certain positions in public employment. §§ 1 and 2, chapter 377, Laws of 1955; RCW 9.81.070 and .080, Appendix.

b. The affidavit is, when required, one which requires the negation of *present* membership only in the "Communist Party or other subversive organization." § 1, chapter 377, Laws of 1955; RCW 9.81.070; R. 25, 27, 32, 34. *Past* membership is not involved.

c. The affidavit, when required, concerns only present membership in an organization *with knowledge* that such organization is a subversive or foreign subversive organization as defined. § 1, chapter 142, Laws of 1953; RCW 9.81.010; R. 20. The Communist Party is declared to be a subversive organization. § 4, chapter 377, Laws of 1955; RCW 9.81.083; R. 25, 32.

B. APPELLANTS' ARGUMENT REGARDING DUE PROCESS WAS NOT MADE TO THE COURT BELOW

Appellants' argument that the oath requirement violates due process because a present or prospective employee is not afforded a hearing for the purpose of explaining his subjective motive for present membership in an organization known by him to fall within the definition of subversive or foreign subversive organization, as those terms are defined in the 1953 Amendatory Act (RCW 9.81.010 (2) and (3), Appendix), is a complete departure from the argument made to the Supreme Court of Washington (Respondents' Brief for the court below, pp. 24 through 42). It was there argued that the oath requirement (RCW 9.81.080, Appendix) denied due process because scienter of the organizational purpose was not required of persons required to take the oath and that, therefore, an indiscriminate classification of the innocent with the knowing would result, contrary to the holding of this court in *Wieman v. Updegraff*, *supra*. But in making this argument appellants apparently overlooked or avoided the plain import of the 1953 act (chapter 142, Laws of 1953, amending RCW 9.81.010, Appendix) by which the definition of "subversive person" as theretofore contained in the basic act of 1951 was amended to include this essential element because of the objection noted in the *Wieman* case, *supra*. Because of this amendment, the state supreme court rejected appellants' argument that scienter or organizational pur-

pose was unnecessary under the 1955 amendment (R. 20; § 1, chapter 377, Laws of 1955, RCW 9.81-.070, Appendix). With reference to appellants' attack on the *form* of the oath demanded, the court found that the element of scienter "is implied in every clause thereof and of the pertinent statutory provisions" (R. 35).

Now—for the first time—appellants raise new and different arguments neither propounded to, nor considered by, the state courts. Appellants now contend that due process requires a hearing, either before a present employee is discharged or before an applicant for employment is rejected, at which time the employee or applicant is afforded the opportunity to explain why his *present* membership in an organization known to him to be subversive or foreign subversive (as defined in RCW 9.81.010 (2) and (3), Appendix) should not require that the mandates of RCW 9.81.060 and .070 (§ 11, chapter 254, Laws of 1951, and § 12, chapter 254, Laws of 1951, respectively; Appendix) be effected. It is evident therefore, that appellants' argument in this court is not an attack upon the validity of the amendatory act of 1955, construed by the Washington courts, but is rather an attack upon the basic act of 1951 and the amendatory act of 1953, inasmuch as it is RCW 9.81.060 (§ 11, chapter 254, Laws of 1951, Appendix) which precludes subversive persons from public employment and RCW 9.81.010 (§ 1, chapter 142, Laws of 1953, Appendix) which defines "subversive person." The

oath required by RCW 9.81.070 (§ 12, chapter 254, Laws of 1951) is nothing more than a statement that the affiant is not presently a subversive person who, under the basic (1951) and amendatory (1953) acts would be ir eligible for public employment.

Moreover, appellants' argument I-A, (Br. 9 through 16) is entirely premature. It should not be reached in this proceeding in the absence of some necessity for so doing. The fact is, that appellants have not made the requisite affidavit; nor have they refused to make it under the interpretation regarding scienter placed upon it by the Washington Supreme Court. They come before this court after refusing to make the affidavit regardless of the consequences of such refusal.

To illustrate, on page 42 of their brief in the Washington Supreme Court appellants (then respondents) asserted:

> "It is apparent from these cases that the mere fact of refusal to answer questions relative to 'subversive activities' cannot constitutionally be grounds for the discharge of a state employee. This the 1955 Act would do upon the mere refusal to answer questions or the refusal to execute the oath. It is also apparent that even actual membership in the Communist Party, which is proscribed the 1955 Act, cannot be grounds for discharge."

Answering this argument, the court below said:

> "The foregoing authorities clearly hold that, without violating any of the constitutional

> rights here invoked by respondents, the state is entitled to ask this question and to demand an answer as a condition of continued employment. Refusal to answer is sufficient grounds for discharge, whether it be for 'incompetency' (*Beilan v. Board of Education, supra*), or because by his lack of candor he provides evidence of his 'doubtful trust and reliability.' (*Lerner v. Casey, supra.*)" (R. 35)

Since appellants have not answered the question demanded, *i.e.*, whether they are members of the Communist Party or other subversive organization, it is clear that the consequences visited upon their failure to do so should not be considered, particularly in the absence of some direct acknowledgment that they cannot make the affidavit under the interpretation made by the Washington Supreme Court. Of course, appellants have made no such concession. They simply propound the hypothetical: "What *if* they do refuse on any ground to make the affidavit (*viz.* answer the question asked, on oath) and are subsequently discharged?"

In this respect, this case is precisely the same as *Garner v. Board of Public Works of Los Angeles*, 341 U. S. 716, wherein Mr. Justice Clark, speaking for the majority, said at page 720:

> "Petitioners have assumed that the oath and affidavit provisions of the ordinance present similar constitutional considerations and stand or fall together. We think, however, that separate disposition is indicated.

"1. The affidavit raises the issue whether the City of Los Angeles is constitutionally forbidden to require that its employees disclose their past or present membership in the Communist Party or the Communist Political Association. Not before us is the question whether the city may determine that an employee's disclosure of such political affiliation justifies his discharge."

Cf. *Fox v. Washington*, 236 U. S. 273.

On page 10 of their brief appellants thrust three hypothetical situations at this court and invite an abstract, advisory ruling upon the constitutionality of the act with reference to the facts thus posed. In *Federation of Labor v. McAdory*, 325 U. S. 450, 461-462, this court, speaking through the late Mr. Chief Justice Stone, said:

"The requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit, * * * This Court is without power to give advisory opinions. * * * It has long been its considered practice not to decide abstract, hypothetical or contingent questions, * * * or to decide any constitutional question in advance of the necessity for its decision, * * * or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, * * * or to decide any constitutional question except with reference to the particular facts to which it is to be applied, * * *

"A law which is constitutional as applied in one manner may, it is true, violate the Constitution when applied in another. * * * But 'Since all contingencies of attempted enforcement cannot be envisioned in advance of those applications' this Court has felt bound to delay passing on 'the constitutionality of all the separate phases of a comprehensive statute until faced with cases involving particular provisions as specifically applied to persons who claim to be injured.' * * * All these considerations forbid our deciding here the constitutionality of a state statute of doubtful construction in advance of its application and construction by the state courts and without reference to some precise set of facts to which it is to be applied. The declaratory judgment procedure may be resorted to only in the sound discretion of the Court and where the interests of justice will be advanced and an adequate and effective judgment may be rendered. * * *" [Cases omitted.]

It is noted that this case comes before this court on appeal from the judgment of the Supreme Court of Washington in a *declaratory judgment proceeding*. It should, therefore, be considered in light of the facts before the Washington courts; and appellants should not now be permitted to enlarge upon those facts by adding hypothetical situations calling for advisory opinions on matters not shown to be applicable to the facts of their own case. Particularly should this be true where, as here, these mat-

ters were not called to the attention of or ruled upon by, the Washington Supreme Court.

Appellees submit that there will be time enough to consider these arguments after appellants have signed the affidavit (in which case such arguments will be moot) or after they have been discharged because of their refusal to make the affidavit (in which case their arguments shall be removed from the realm of the hypothetical and shall become actual). In the latter event appellants would have the opportunity of presenting the arguments, presently raised here, to the Supreme Court of Washington.

In view of the foregoing, question number one (1) (appellants' brief, page 3), should not be considered by this court. Illustrative of this point is the complete failure of appellants to show in their brief opposing appellees' motion to dismiss (pages 4, 5) that their present argument was ever raised in the courts below, except by reference to quoted cases argued in connection with their contention that scienter of organizational purpose was lacking in the oath and the law under which it is required. Appellees submit that, in any event, the Supreme Court of Washington should be first given the opportunity to consider and pass upon this new, additional and different argument.

Notwithstanding the foregoing, appellees will proceed to discuss and rebut appellants' arguments made with respect to due process under questions numbered one (1) through three (3) presented for

review (Br. 3, 4). For convenience, appellants' format will be followed.

C. AUTOMATIC AND SUMMARY DISCHARGE WITHOUT OPPORTUNITY FOR HEARING

Appellants' argument (under subsection A of their brief) that the exaction of the oath violates due process may be summarized as follows:

1. Summary dismissal of a public employee (or rejection of an applicant for public employment) on his refusal to make the required statement under oath, violates due process because:

(a) Such employee (or applicant) is not given an opportunity to be heard or to explain the reason for his *present* membership in an organization *known* to him to be subversive or foreign subversive as defined in the act (§1, chapter 142, Laws of 1953; RCW 9.81.010 (2) and (3), Appendix). In this regard appellants envision three hypothetical situations wherein a subversive person (as defined in the act) might conceivably be entirely innocent of any disloyal objective. (His *subjective* motive might be innocent), (Br. 9, 10).

(b) A "large and respectable segment of our citizenry" oppose any "disclaimer oath" and the Washington oath may not be acceptable to "some loyal and worthy citizens because of its offensive and insulting nature." (Br. 10, 11.)

(c) The oath requirement is arbitrary because "the questions asked (the oath required) are taken

as confessed and made the basis of discharge." Quoting *Slochower v. Board of Education of New York*, *supra*, (Br. 11-13).

(d) While the oath requirement might exclude "*some* disloyal or otherwise unfit employees" [emphasis supplied] it would also exclude loyal and fit employees and is, therefore, indiscriminate in classification. *Wieman v. Updegraff*, *supra* (Br. 13).

(e) The court below did not discuss several decisions of this court cited to it because:

> "* * * It is suggested that this failure was due to an unwillingness to recognize any constitutional limitations whatsoever upon the State's power and method of discharging its employees or of dealing in the area of loyalty inquiries." (Br. 16.)

Before answering each of these contentions it is well to consider the scope of the constitutional provision deemed violated. What is "due process"? Quite recently, in *Bartkus v. Illinois*, 359 U. S. 121, Mr. Justice Frankfurter speaking for the majority discussed this broad concept at p. 126:

> "* * * In *Hurtado v. California*, 110 U. S. 516, this Court considered due process in its historical setting, reviewed its development as a concept in Anglo-American law from the time of the Magna Carta until the time of the adoption of the Fourteenth Amendment and concluded that it was intended to be a flexible concept, responsive to thought and experience—

experience which is reflected in a solid body of judicial opinion, all manifesting deep convictions to be unfolded by a process of 'inclusion and exclusion.' *Davidson v. New Orleans*, 96 U. S. 97, 104. Time and again this Court has attempted by general phrases not to define but to indicate the purport of due process and to adumbrate the continuing adjudicatory process in its application. The statement by Mr. Justice Cardozo in *Palko v. Connecticut*, 302 U. S. 319, has especially commended itself and been frequently cited in later opinions. Referring to specific situations, he wrote:

> 'In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.' 302 U. S., at 324-325.

"About the meaning of due process, in broad perspective unrelated to the first eight amendments, he suggested that it prohibited to the states only those practices 'repugnant to the conscience of mankind.' 302 U. S., at 323."

And what is the test of due process when applied to a statute of a sovereign state? In *In re Groban*, 352 U. S. 330, 334, this court adhered to its earlier decision in *Hebert v. Louisiana*, 272 U. S. 312, 316 that "the test to measure the validity of a state statute under the Due Process Clause" is whether, as

construed, the statute contravenes "fundamental principles of liberty and justice."

Does the statute presently before the court, bearing the interpretations placed upon it by the Supreme Court of Washington, deny to appellants some "fundamental principle of liberty and justice" (*In re Groban, supra*)? Or, does it deny to appellants the free exercise of some privilege or immunity which is "implicit in the concept of ordered liberty"? Is the statute, so construed, "repugnant to the conscience of mankind" (*Palko, supra*, 323)? Appellees submit that careful analysis requires negative answers to all of these questions.

The answers to these several arguments follow in the order above presented:

1. (a) Summary dismissal of a public employee (or the rejection of an applicant for employment) upon failure to meet reasonable standards prescribed by the legislature as prerequisite to continuing (or obtaining) such employment does *not* violate due process.

This court pointed out in *Slochower v. Board of Education of New York, supra*, on page 555 that:

> "To state that a person does not have a constitutional right to government employment is only to say that he must comply with *reasonable, lawful*, and nondiscriminatory terms laid down by the proper authorities." (Emphasis supplied.)

On page 559 the court continued:

"*The State has broad powers in the selection and discharge of its employees*, and it may be that proper inquiry to show Slochower's continued employment to be inconsistent with a real interest of the State." (Emphasis supplied.)

Garner v. Board of Public Works, *supra*, page 720, quoted, in part, with approval in the *Slochower* case, *supra*, held:

"We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment. The affidavit requirement is valid."

With particular reference to teachers, this court in *Adler v. Board of Education*, *supra*, page 493, after quoting the paragraph from *Garner*, *supra* just cited, went on to say:

"We adhere to that case. A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials,

teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps. *In the employment of officials and teachers of the school system, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate.*" (Emphasis supplied.)

And in both *Lerner v. Casey*, 357 U. S. 468, and *Beilan v. Board of Education*, *supra*, a public employee could be discharged upon his refusal to answer pertinent questions relative to continued employment.

In *Beilan*, *supra*, dismissal of a teacher upon a finding of "incompetency" was approved where the teacher refused to answer questions pertaining to *past* communistic affiliations and activities, unlike this case where the inquiry concerns *present, knowing* membership.

Lerner, *supra*, sustained the discharge of a subway conductor who when asked whether he was then a member of the Communist Party refused to answer, claiming his privilege against self-incrimination. This court on page 472 accepted a finding:

> "* * * that upon all the evidence, reasonable grounds exist for belief that, because of doubtful trust and reliability * * * continued employment would endanger national and state security."

This court on page 475 reaffirmed the reasoning of the New York Court of Appeals that the motorman had not been discharged

> "* * * because of any inference of Communist Party membership which was drawn from the exercise of the Fifth Amendment privilege nor because of the assertion of that constitutional protection, but rather because of the doubt created as to his 'reliability' by his refusal to answer a relevant question put by his employer, * * *"

It is submitted that the foregoing cases clearly demonstrate:

(1) That the public employer does have a right to prescribe reasonable qualifications, neither arbitrary nor discriminatory, which must be met by public employees or applicants for public employment, as a condition of holding, or obtaining, such employment. *Slochower*, *Garner*, *Adler*, *Lerner* and *Beilan*, all *supra*.

(2) That loyalty is a matter "relevant to * * * fitness and suitability for public service, [including] * * * membership, past or present, in the Communist Party or the communist political association" (*Garner*, *supra*), particularly so

with reference to teachers (*Adler, Beilan,* both *supra.*)

(3) That a present employee may be discharged upon refusal to answer whether he is presently a member of the Communist Party (*Adler, Beilan, Lerner,* all *supra*) whether it be upon a finding of "incompetency" (*Beilan, supra*) or of "doubtful trust and reliability," (*Lerner, supra.*)

Given the fact that the state has a right to ask the question it is submitted that it makes absolutely no difference whether the pertinent question is asked at a hearing or whether it is asked at some other time, whether it be upon application for employment or during the course of employment. Whatever reason the employee, or applicant, may have for refusing to answer the question, his refusal to answer may result in his discharge or rejection, either on grounds of "incompetency," "doubtful trust and reliability" or, perhaps, insubordination.

But to say that an employee may be discharged for failure to answer a pertinent question, on oath, is not to say that an affirmative answer to the question posed must be implicit, or necessarily implied, from the fact of refusal. Thus, refusal of appellants in the present case to subscribe the affidavit required by statute concerning their present membership in the Communist Party or other subversive organization cannot, and should not, be taken as an admission of the fact of membership. Such a conclusion is wholly speculative and conjectural, being based upon

unnecessary inference. For, as pointed out by appellants (in argument 1 (b) above, Br. 10, 11) a large segment of our citizenry may find that answering loyalty questions, under oath, is offensive and even insulting and may refuse to make the affidavit for that reason. In short, there may be many reasons why a particular employee may refuse to, and does not, make the affidavit, but such refusal does not necessarily connote that such person *could not* make it if he elected to do so.

Many statutes restrict the exercise of particular rights to persons of certain age groups. For example, candidates for public office, applicants for professional licenses, motor vehicle operators' licenses, tax exemptions, *inter alia*, may be required to meet a certain age requirement, and to declare their age upon oath. Could it be reasonably said that refusal to make such an affidavit disqualified a person because he was not of the prescribed age? Appellants would argue—quite consistently—that a hearing would be necessary before an application could be rejected. The applicant, in fact, has failed to meet the prescribed condition precedent to obtaining the objective desired.

1. (b) The fact that the oath is "offensive to a large and respectable segment of our citizenry," does not make it violative of due process.

In this regard, appellants' argument is addressed to the wisdom and expediency of the legislation under which the "non-Communist affidavit" is

required, not to the constitutional validity of the statute requiring it. This argument is one which should properly be made to the Washington legislature and not to this court, or any other. Moreover, a similar contention with respect to the propriety of the Hatch Act was summarily rejected by this court in *United Public Workers v. Mitchell*, 330 U. S. 75, 89.

1. (c) The oath requirement is *not* arbitrary in that "the questions asked (the oath required) are taken as confessed and made the basis of discharge."

In support of their argument to the contrary, appellants cite *Slochower, supra.* Several distinctions between the situation there involved and that now involved are patent.

Firstly, Slochower was discharged not for failing to answer a question posed by his employer, the City of New York, but because he invoked the privilege against self-incrimination before a subcommittee of the United States Senate. This court said at 350 U. S. at page 558:

> "It is one thing for the city authorities themselves to inquire into Slochower's fitness, but quite another for his discharge to be based entirely on events occurring before a federal committee whose inquiry was announced as not directed at 'the property, affairs, or government of the city, or * * * official conduct of city employees.' In this respect the present case differs materially from Garner, where the city

was attempting to elicit information necessary to determine the qualifications of its employees."

Secondly, as in *Schware v. Board of Bar Examiners*, 353 U. S. 232, the questions asked pertained to long-past rather than present membership in the Communist Party. It is significant that Slochower did testify that "he was not a member of the Communist Party," 350 U. S. at page 553. A discharge on the basis of past membership violates "fair play" since it allows no opportunity for rehabilitation. In the present case appellants apparently take the position that while the state may have a right to ask that question, it has not the right to have it answered.

Thirdly, as pointed out above, *Slochower, supra* differs from the present case in that no inference of disloyalty, membership in the Communist Party or other subversive organization (as defined), or the commission of any crime necessarily follows from the refusal to comply with the oath.

1. (d) The statute requiring the affidavit does not deny due process because some loyal and fit employees may be precluded from public employment on refusing to make it.

The *only* affidavit required by the statute (RCW 9.81.070, Appendix) is that an employee or applicant for employment, except as otherwise provided in RCW 9.81.080 (Appendix), state whether he *is* a member of the Communist Party or other subversive organization at the time of taking the oath (R. 27). Any person who is not a

member of such an organization can take the oath without fear of perjuring himself. But, for one reason or another, he may not do so. He may find the affidavit "offensive or insulting" and may not, or need not take it. This is purely a matter of election, open to all persons. Appellants' reference to *Wieman v. Updegraff*, *supra*, certainly does not stand for the proposition presently asserted. There it was the indiscriminate classification of members having knowledge of organizational purpose with members lacking such knowledge that was found indiscriminate and arbitrary. In addition, since the oath related to past as well as present membership there was nothing that a former member could do to "unlock the door" barring state employment. Here, even a present member "carries the key to unlock the door" since he may resign as a member and become eligible.

1. (e) The fact that the Washington Supreme Court failed to mention in its opinion several cases cited by appellants is not indicative of a violation of due process.

The tacit implication that the Washington Supreme Court ignored certain decisions of this court cited to it by appellants is palpably incorrect. Demonstrative of this is the fact that the court followed *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, in holding section 3 of the 1955 amendatory act unconstitutional and followed

Wieman v. Updegraff, supra, on the question of scienter of organizational purpose.

But why did not the court below discuss the *Slochower* and *Schware* cases, both *supra* (above discussed) or *Konigsberg v. State Bar of California*, 353 U. S. 252, and *Sweezy v. New Hampshire*, 354 U. S. 23 It is because they lacked pertinency and were so dissimilar on the facts as not to be persuasive.

Two cases involved teachers (*Slochower* and *Sweezy, supra*). One case involved the discharge of the teacher based upon his exercising the privilege against self-incrimination before a congressional sub-committee (*Slochower, supra*); while *Sweezy, supra*, involved a contempt of court conviction based upon the teacher's refusal to answer questions put to him in court (subsequent to his refusal to answer the same questions when posed by the attorney general of New Hampshire while acting as a one-man legislative investigating committee). In view of a state court interpretation of the definition of "subversive person," this court compared the situation to that of *Wieman v. Updegraff, supra.* Further, this court stated in the *Sweezy* case, *supra*, on page 249:

> "* * * The State Supreme Court carefully excluded the possibility that the inquiry was sustainable because of the state interest in the state university. There was no warrant in the authorizing resolution for that. 100 N. H., at 110, 121 A2d 783. The sole basis for the

inquiry was to scrutinize the teacher as a person, and the inquiry must stand or fall on that basis."

Like the *Schware* case, *supra*, *Konigsberg*, *supra*, involved an applicant for a state bar, not for a sensitive position which would come under the act in question. Konigsberg refused to answer certain questions of the bar examining committee on constitutional grounds. He was not advised that his refusal to answer such questions would, in itself, constitute grounds for his rejection. Nevertheless, he was rejected for refusal to answer questions pertaining to his association with the Communist Party, his criticism of certain public officials and their policies and his political associations and beliefs. He stated that he was not a communist, but declined to say whether he was a member of the Communist Party.

In each of these cases, except *Konigsberg*, the person involved had already answered in the negative when asked, under oath, whether he was then a member of the Communist Party.

Unlike Konigsberg, appellants here are aware that they will be discharged if they elect not to sign the affidavit required. They are so informed by the statute itself. And unlike, *Slochower*, *Sweezy* and *Schware*, all *supra*, the affidavit requires appellants to state that they are not now members of the Communist Party or other organization known to them to be subversive.

Appellees submit that appellants argument I-A

(Br. 9-16) does not support the proposition that dismissal is violative of due process simply because it is immediate. To deny to the public employer the right to have a question answered is to negate the right of the employer to ask it.

D. MEMBERSHIP IN A SUBVERSIVE ORGANIZATION IS MADE CONCLUSIVE PROOF OF UNFITNESS FOR STATE EMPLOYMENT

Under this heading appellants attempt to illustrate that the oath requirement denies due process because it precludes present members of an organization having knowledge that such organization is subversive (as defined in RCW 9.81.010 (2) and (3), Appendix) from holding sensitive positions in public employment. But that is not the question. Rather, may a state exclude present members of organizations known by them to be subversive (as defined) from public employment? The obvious answer is that to deny to the state the right to exclude persons committed to its destruction is to deny to the state the right of self-preservation, fundamental to men and states.

Appellants cite *Konigsberg* and *Schware*, both *supra*, as supporting their argument. They fail to recognize that there is a vast distinction between one's right to pursue a given calling and one's right to work for a particular employer. Neither of the cited cases involved public employment; both cases involved factually different situations. Those cases would be more in point if Schware or Konigsberg

were seeking election to public office in a state requiring the execution of a non-Communist affidavit as a condition precedent to the placing of his name on the ballot. But then they would run headlong into the decision of this court in *Gerende v. Election Board*, 341 U.S. 56, and would be required to make the affidavit.

It may be that knowing membership in a "subversive organization may be innocent in the sense that it involves neither a guilty mind nor a danger to the state" (Br. 18). But, of course, the danger to the state lies in the guilt of the mind. Both are difficult, if not impossible to measure. Because of the difficulty encountered in proving or disproving the subjective intent, purpose or motive for one's present membership in an organization bent on overthrowing, destroying or altering the government of the United States or the state of Washington by force or violence, our legislature has found it necessary to preclude all such members from public employment.

It should be pointed out that if a person is a member of an organization of the proscribed class and desires public employment, he may resign his membership and take the oath.

No useful purpose would be served in discussing appellants' quotes out of context from the *Wieman* case, *supra*. It is enough to say that the discrimination which appellants argue under this heading is the type approved by this court in *Gerende*, *supra*, and is not the type of indiscriminate classification (of

members having knowledge of organizational purpose with members lacking such knowledge) condemned in *Wieman, supra.*

Legislative bodies have often found it necessary to place a restriction on members of an organization or upon a particular class where the interests of the organization or class are inimical to a substantial governmental interest. This court has upheld such legislation as to the so-called Mormon Church (*Davis v. Beason*, 133 U. S. 333, *Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U. S. 1), bank directors (*Board of Governors of Federal Reserve System v. Agnew*, 329 U. S. 441), civil servants, (*United Public Workers v. Mitchell, supra*), the Communist Party (*American Communications Association v. Douds*, 339 U. S. 382). In the *Douds* case, *supra*, in 339 U. S. on pp. 391, 392 this court mentioned additional cases.

E. No Scienter Requirement as to Membership in the Communist Party

Under this heading appellants argue that the statute violates due process because scienter of organizational purpose of the Communist Party is not required; therefore, the indiscriminate classification is arbitrary. *Wieman v. Updegraff, supra.*

§ 4 of the 1955 amendatory act (RCW 9.81.083, Appendix) provides:

> "The communist party is a subversive organization within the purview of RCW 9.81 and

membership in the communist party is a subversive activity thereunder."

The purpose of this declaration of fact was stated by the Washington Supreme Court:

"* * * * Obviously, sections one and four were designed to prevent any claim (which the legislature found to be entirely unfounded in fact) that the communist party was not, and is not, a 'subversive organization' as defined in the 1951 act, as amended." (R. 25)

Further:

"* * * That the communist party was, in fact, a subversive organization, as defined in the 1951 act, at the time that our legislature designated it as such (by § 4 of the 1955 act), can scarcely be doubted. (See appendix C.)

"Even prior to the commencement of hostilities in Korea in 1950, numerous judges had recognized the communist party as a part of a world conspiracy having as its prime objective the overthrow of the United States government by force and violence, or whatever means possible, constitutional or otherwise. Since then, Congress, in 1950, enacted legislation designed to control the communist party, and, in 1954, proscribed it. The courts of New Jersey and Pennsylvania take judicial notice of the fact. We can, and do now, hold likewise, because the fact that the communist party is a subversive organization is now a matter of common knowledge." (R. 32, 33)

Other cases holding likewise are collected in the margin.[3]

This statute was apparently intended to import constructive knowledge to any present member of the Communist Party that such organization is, in fact, subversive. Thus any present member of the Communist Party would be ineligible for public employment.

The statute does nothing more than add this well recognized fact to a general definition "subversive organization," further and more particularly defining it.

In *Konigsberg v. State Bar of California, supra*, it was emphasized that Konigsberg was not advised of the consequences which would be attendant upon

[3] Some courts which have taken judicial notice of the purposes of the Communist Party:

USCA (9th) Circ.
Carlson v. Landon, 187 F. 2d 994, 997 (1951).

D. C. Md.
U. S. v. Chandler, 152 F. Supp. 169, 175 (1957).

California
Black v. Cutter Laboratories, 278 P. 2d 905, 916, 43 C. 2d 788, 806 (1955); Certiorari dismissed, 351 U. S. 292, 76 S. Ct. 824, 100 L. ed. 1188.

Florida
State v. Kelly, 76 So. 2d 798, 801-802.

New Jersey
Laba v. Newark Board of Education, 3 N. J. 464, 129 A. (2d) 273 (1957).

New York
Dauman v. Board of Education, 113 N. Y. S. 487, 489 (1952).

Ohio: (Common Pleas)
Dworken v. Cleveland Board of Ed., 94 N. E. 2d 18, 25 (1950), affirmed 108 N. E. 2d 103, appeal dismissed.

(Court of Appeals)
Fairfax Airflex Co., Inc. v. United Electrical R. & M. Wkrs., 92 N. E. 2d 436, 455, 87 Ohio App. 371 (1950); Appeal dismissed, 93 N. E. 2d 409, 154 Ohio St. 106, 95 N. E. 2d 764, 154 Ohio St. 382.

Oregon
Application of Patterson, 318 P. 2d 907, 913, 210 Ore. 495 (1957).

Pennsylvania
Matson v. Margiotti, 88 A. (2d) 892, 895, 371 Pa. 188 (1952).
Albert Appeal, 372 Pa. 13, 92 A. (2d) 663 (1952).

his refusal to answer the questions posed by the bar examining committee. In this case, the statute itself imports to any employee, or applicant, particular notice that subversive persons cannot be employed in sensitive occupations in state government; that a person who is a member of the Communist Party is a subversive person and cannot be employed by the state while retaining such membership.

Appellants' argument here is comparable to that addressed to the Supreme Court of Washington on pages 42 and 43 of appellants' (then respondents') brief:

> "It is apparent from these cases that the mere fact of refusal to answer questions relative to 'subversive activities' cannot constitutionally be grounds for the discharge of a state employee. This the 1955 Act would do upon the mere refusal to answer questions or the refusal to execute the oath. It is also apparent that even actual membership in the Communist Party, which is proscribed the 1955 Act, cannot be grounds for discharge. To hold otherwise would be a denial of due process. It is interesting to note that *Yates v. United States*, 354 U. S. 298, refines the construction of the Smith Act and holds that advocacy alone of the overthrow of the government by force or violence is not sufficient to sustain a conviction; but that the advocacy or teaching must be coupled with concrete action for the forcible overthrow of the government. The proscribed advocacy or teaching under the Smith Act is such that incites to illegal action."

Appellees submit that much has been learned about the Communist Party and its tactics over the past forty years. But if any doubt as to the character of the organization existed prior to 1950, that doubt has since been dispelled by action. The Washington legislature would have been remiss in not taking notice of history and current events by failing to define the Communist Party as subversive.

As pointed out by the late Mr. Justice Vinson in *American Communications Assn. v. Douds*, 339 U. S. on pp. 400, 401:

> "* * * insofar as the problem is one of drawing inferences concerning the need for regulation of particular forms of conduct from conflicting evidence, this Court is in no position to substitute its judgment as to the necessity or desirability of the statute for that of Congress. Cf. *United Public Workers v. Mitchell*, *supra* (330 US at 95, 102). In *Bridges v. California* (US), *supra*, we said that even restrictions on particular kinds of utterances, if enacted by a legislature after appraisal of the need, come to this Court 'encased in the armor wrought by prior legislative deliberation.' 314 US at 261. Compare *Gitlow v. New York*, 268 US 652. The deference due legislative determination of the need for restriction upon particular forms of conduct has found repeated expression in this Court's opinions."

F. Recapitulation of Appellees' Answer to Due Process Argument

1. (This argument should not be considered by this court, but if the court holds otherwise:) The affidavit requirement does not violate due process in requiring summary dismissal of a public school teacher who refuses to state under oath whether he is presently a member of the Communist Party or other subversive organization as defined in the act. *Gerende, Garner, Adler, Beilan, Lerner*, all *supra;* cf. *United Public Workers v. Mitchell, supra;* distinguished as not pertinent: *Wieman v. Updegraff, supra.*

2. Due process is not denied by a state statute forbidding present, knowing members of the Communist Party or other subversive organizations from holding positions in sensitive areas of public employment: *Gerende, Garner, Adler, Beilan, Lerner.* Distinguishable as not applicable to public employment: *Schware v. Board of Bar Examiners,* and *Konigsberg v. State Bar of California,* both *supra.*

3. Statute which forbids present members of the Communist Party from holding positions in sensitive areas of public employment does not deny due process. *Beilan v. Board of Education* and *Lerner v. Casey,* both *supra.*

Appellees submit that the statute which requires the non-Communist affidavit as a condition of employment does not deny appellants due process. Appellants have failed to cite one decision of this court—

and it appears that none can be found which would support their propositions presently asserted. On the other hand, appellees have noted a series of cases (*Garner*, *Adler*, *Gerende*, *Beilan* and *Lerner*, all *supra*) which support conclusions opposite to those asserted by appellants. But perhaps the clearest answer to appellants' entire argument is found in *Lerner v. Casey*, 357 U. S., where at pages 477 to 478 this court said:

> "* * * This Court pointed out in Garner that a government employee can be required upon pain of dismissal to respond to inquiry probing into matters relevant to his employment, and that present membership in the Communist Party is such a matter. See also *Beilan v. Board of Public Education*, 357 US 399, *supra*. Certainly it is not a controlling constitutional distinction that New York, rather than impose on employees, as in *Garner* and *Beilan*, an absolute duty to respond to permissible inquiry upon threat of dismissal for refusal, has in these proceedings held that an employee lacking in candor to his governmental employer evidences doubt as to his trust and reliability. Finally, unlike the situation involved in *Konigsberg v. State Bar of California*, 353 US 252, *supra*, there is here no problem of inadequate notice as to the consequences of refusal to answer, for appellant was specifically notified that continued refusal might lead to his dismissal."

II

THE AFFIDAVIT REQUIREMENT DOES NOT CONSTITUTE A BILL OF ATTAINDER

The late Chief Justice Vinson in *American Communications Asso. v. Douds, supra*, p. 413, said:

> "The unions' argument as to bill of attainder cites the familiar cases, *United States v. Lovett*, 328 US 303; *Ex parte Garland* (US) 4 Wall 333; *Cummings v. Missouri* (US) 4 Wall 277. Those cases and this also, according to the argument, involve the proscription of certain occupations to a group classified according to belief and loyalty. But there is a decisive distinction: in the previous decisions the individuals involved were in fact being punished for *past* actions; whereas in this case they are subject to possible loss of position only because there is substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into *future* conduct. Of course, the history of the past conduct is the foundation for the judgment as to what the future conduct is likely to be; but that does not alter the conclusion that § 9 (h) [the "non-Communist affidavit" provision of the Taft-Hartley Act] is intended to prevent future action rather than to punish past action.
>
> "* * * Here the intention is to forestall future dangerous acts; there is no one who may not, by a voluntary alteration of the loyalties which impel him to action, become eligible to sign the affidavit. We cannot conclude that this section is a bill of attainder."

In *Garner v. Board of Pub. Wks. of Los Angeles*, *supra*, p. 722, Mr. Justice Clark said:

> "* * * Whether legislative action curtailing a privilege previously enjoyed amounts to punishment depends upon 'the circumstances attending and the causes of the deprivation.' *Cummings v. Missouri* (US) 4 Wall 277, 320. We are unable to conclude that punishment is imposed by a general regulation which merely provides standards of qualification and eligibility for employment."

Appellants have not even tried to distinguish these cases which are dispositive of the entire bill of attainder argument, but have met them head-on by asking that the court "re-examine the premise of *Douds* and *Garner* * * *" (Br. 28, 29). Appellees submit that a re-examination of the premise in the light of the present case would, on the contrary, only buttress the court's conviction that the cases are correct.

The court has prudently not allowed *United States v. Lovett*, *supra*, to become a "Pandora's box;" this court has not allowed the vague contours of the concept of legislative punishment to overlap with other constitutional guarantees.

Appellants have cited no case in which this court has found a prospective act to be a bill of attainder. The acts struck down in the *Garland*, *Cummings*, and *Lovett* cases all involved punishment for past misdeeds. It is true that the punishment for past deeds was often conditioned on a future act such as

appearing within an appointed time, as numerous examples in appellants' brief reveal; but in each case the individual punished could not have avoided the sanction. For example, as one writer has pointed out in 28 Rocky Mt. L. Rev. 258:

> "Garland and Cummings could not alter the fact that they had supported the confederacy in the Civil War. Lovett, Dodd, and Watson could never again qualify as governmental employees whether they changed their loyalties or not."

Mr. Justice Frankfurter in a concurring opinion in *United States v. Lovett*, *supra*, page 323, said:

> "* * * But if it is not an *ex post facto* law, the reasons it is not are persuasive that it cannot be a bill of attainder."

Whether that statement was applicable in the *Lovett* case or not, we submit that it is certainly applicable in the present case. In other words, the fact that the action in the present case is prospective is convincing evidence that the act was not an act of punishment but rather a regulatory act to control the future action of those coming under the act. A member of a subversive organization cannot claim that he is penalized merely because the state requires him to resign as a condition of employment in a sensitive position. The requirement of non-membership is reasonably related to the end sought: trustworthy public employees.

Although appellees will not comment on this portion of appellants' brief sentence by sentence—this would merely constitute a chain of rejoinders—

appellees would like to make a few general observations. The most important shortcoming is the fact that although there is considerable discussion about bills of attainder being prospective, there is a dearth of argument to show that the affidavit requirement in question constitutes a bill of attainder even assuming, *arguendo*, that one could be prospective. To begin with, appellants have not shown any punishment and punishment is certainly a prerequisite. Appellants have shown nothing to negate the belief of the lower court that the oath requirement is a reasonable employment qualification. Mr. Wormuth, in 4 Vand. L. Rev. 603, whom appellants have quoted extensively (Br. 31, 32), assumes in his article that a penalty has been exacted. No penalty, however, has been exacted in the present case.

But, as Mr. Justice Frankfurter said in his concurring opinion in *United States v. Lovett*, *supra*, on page 324:

> "The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation. A man may be forbidden to practice medicine because he has been convicted of a felony, *Hawker v. New York*, 170 U. S. 189, or because he is no longer qualified, *Dent v. West Virginia*, 129 U. S. 114."

The court below (R. 27), relied upon the *Garner* case, *supra*, in holding that:

> "Section twelve of the 1951 act, as amended by Laws of 1955, chapter 377, § 1, requires only that every present or prospective public employee state, under oath, whether he or she is 'a member of the communist party or other subversive organization' at the time the oath is taken. No punishment for past conduct or political activity is involved. Only one qualification precedent to public employment is imposed. In short, this section is clearly neither *ex post facto* nor in the nature of a bill of attainder."

The fact is that the affidavit requirement in the present case works less of a hardship on the person affected than the ordinance and charter amendment involved in the *Garner* case, *supra;* for here a member of a subversive organization may resign today and take the oath tomorrow. (It will be recalled that the court was split on the question of whether the charter change of 1941 saved the "five years prior" clause of the 1948 ordinance from being *ex post facto.*) Justices Burton's and Frankfurter's objections to the *Garner* ordinance are not present here.

In the *Garner* case, *supra*, the court said on page 720:

> "* * * The provisions operating thus prospectively were a reasonable regulation to protect the municipal service by establishing an employment qualification of loyalty to the

State and the United States. Cf. *Gerende v. Board of Supervisors of Elections*, 341 U. S. 56, ante. Likewise, as a regulation of political activity of municipal employees, the amendment was reasonably designed to protect the integrity and competency of the service. This Court has held that Congress may reasonably restrict the political activity of federal civil service employees for such a purpose, *United Public Workers v. Mitchell*, 330 U. S. 75, 102, 103, and a State is not without power to do as much."

If the oath was an employment qualification in the Garner case, it is an employment qualification here. Appellants have not even attempted to distinguish the two cases in their brief.

In the *Douds* case, *supra*, the court said on page 391 in upholding the "non-Communist" affidavit provision of the Taft-Hartley Act that voluntary affiliations and beliefs justify an inference concerning future conduct when drawn by the legislature on the basis of its investigations.

If the oath was valid as regulating future conduct in the Douds case, it is so in the present case. Again, appellants have not even attempted to distinguish the two cases in their brief. Hence, as was said earlier, even assuming, *arguendo*, that a bill of attainder could be prospective, the act in question is not a bill of attainder but is an employment qualification. This being true, it would be gratuitous comment for the court to comment on the possibility of "prospective bills of attainder." It would involve overruling, in part, several cases.

Another minor point remains to be cleared up. Appellants stated (Br. 30):

> "'If it was clear that *ex post facto* laws were void of themselves would this then not be true of bills of attainder if they were limited to punishment for past conduct only? And, if bills of attainder were by definition intended only to include punishment for past conduct, why include the provision at all? Surely the prohibition of 'ex post facto laws' historically would have been adequate and comprehensive."

The answer is that a bill of attainder involves legislative punishment, but an *ex post facto* law might involve judicial punishment and hence not be a bill of attainder. The framers of the Constitution sought to prohibit both.

III

THE AFFIDAVIT REQUIREMENT IS NOT INVALID AS AN INFRINGEMENT OF THE FIRST AMENDMENT

A. The Affidavit Requirement Satisfies The "Clear and Present Danger" Test

Appellants begin their discussion of the First Amendment (made applicable to the states by the Fourteenth Amendment) with a statement which is hyperbole (Br. 33):

> "* * * Freedom of speech is freedom with respect to *all speech* and encompasses the freedom not to speak—to remain silent. To force an American to publicly profess *any state-*

ment of belief is to violate the First Amendment." (Emphasis supplied.)

Appellants made the same argument (Br. 35), somewhat qualifying this broad statement, as the unions unsuccessfully made in the *Douds* case, *supra*:

> "Where state action infringes upon First Amendment rights, that infringement must be directly related to a substantial evil sought to be met by the statute or other action—there must be a 'clear and present danger.' A statute curtailing or infringing rights of association or rights of speech cannot be punitive or abitrary. There is no substantial evil toward which the oath in this case is directed."

A consideration of the "clear and present danger" test, as it is applied today, is a convenient way of beginning the discussion of the larger question of whether there is here a violation of the First Amendment. The reasoning of the court in the *Douds* case, *supra*, is applicable here. Initially it must be conceded that beliefs are inviolate, *Cantwell v. Connecticut*, 310 U. S. 296. But, as the court pointed out in the *Douds* case, *supra*, on page 394:

> "* * * the attempt to apply the term, 'clear and present danger,' as a mechanical test in every case touching First Amendment freedoms, without regard to the context of its application, mistakes the form in which an idea was cast for the substance of the idea. The provisions of the Constitution, said Mr. Justice Holmes, 'are not mathematical formulas having their essence in their form; they are organic

> living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth. *Gompers v. United States*, 233 U. S. 604." * * * It is the considerations that gave birth to the phrase, 'clear and present danger,' not the phrase itself, that are vital in our decision of questions involving liberties protected by the First Amendment."

On another occasion in *Noble State Bank v. Haskell*, 219 U. S. 104, 110, Mr. Justice Holmes said:

> "* * * we must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual. * * *"

Nor was Justice Holmes alone in making such declarations; for in *Milwaukee Publishing Co. v. Burleson*, 255 U. S. 407, 414, the court said that:

> "* * * The Constitution was adopted to preserve our Government, not to serve as a protecting screen for those who while claiming its privileges seek to destroy it."

In *Schenck v. United States*, 249 U. S. 47, Justice Holmes enunciated the "clear and present danger" test. He said that the test is whether the words used are used in such circumstances and are of such

a nature as to create a clear and present danger that they will bring about the substantive evils which the legislature has a right to prevent. The court, commented on the *Schenck* case, *supra*, in the *Douds* case, *supra*, page 394:

> "* * * it has long been established that those freedoms themselves are dependent upon the power of constitutional government to survive. If it is to survive it must have power to protect itself against unlawful conduct and, under some circumstances, against incitements to commit unlawful acts. Freedom of speech thus does not comprehend the right to speak on any subject at any time. The important question that came to this Court immediately after the First World War was not whether, but how far, the First Amendment permits the suppression of speech which advocates conduct inimical to the public welfare. Some thought speech having a reasonable tendency to lead to such conduct might be punished."

On page 396 the court, with reference to the enunciation of the "clear and present danger" of Justices Holmes and Brandeis, said:

> "But the question with which we are here faced is not the same one that Justices Holmes and Brandeis found convenient to consider in terms of clear and present danger. Government's interest here is not in preventing the dissemination of Communist doctrine or the holding of particular beliefs because it is feared that unlawful action will result therefrom if free speech is practiced. Its interest is in pro-

> tecting the free flow of commerce from what Congress considers to be substantial evils of conduct that are not the products of speech at all."

The clarification of the "clear and present danger" test in two respects became more apparent in *Dennis v. United States*, 341 U. S. 494. Here, four members of an eight-member court held that the evil that the government has a right to avert under the "clear and present danger" test is not limited to the successful overthrow of the government by force and violence. It must be conceded that the evil must be serious and that *Thornhill v. Alabama*, 310 U. S. 88, is correctly cited by appellants (Br. 41) in so far as it is authority for the proposition that mere peaceful picketing does not constitute a sufficiently serious evil to justify the abridgement. But, since the Communist Party is rigidly disciplined and is controlled by a powerful foreign nation, it is not necessary for the Washington legislature to wait until just prior to the *putsch* in order to pass a law which has the effect of preventing subversive persons, as defined in the act, from occupying sensitive positions in state government.

Secondly, Chief Justice Vinson pointed out that the "clear and present danger" test is not an absolute standard. He reiterated his language of the *Douds* case, *supra*, in showing that there was a relative concept to be applied in the light of the particular circumstances of each case. The four members of the court on p. 510 adopted the test of Chief Judge

Learned Hand who wrote for the majority of the court below. Judge Hand said:

> "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."

The Washington legislature found that the effect of employing in sensitive positions knowing members of subversive organizations, including the Communist Party, would lead to future conduct inimical to the state. The lengthy appendices to the decisions of the court below contain enough material to remove any doubt that the legislature acted mistakenly (R. 37 to 49).

It is even apparent from the adumbration of the "clear and present danger" test contained herein that the test has been met.

As the cases considered in the next section of the brief will reveal, the court also applies the "relativistic test" to other areas of the First Amendment.

B. In View of the Governmental Interest Involved, the Affidavit Requirement Does Not Violate the First Amendment

Appellants claim specifically that they have been deprived of (1) the freedom not to speak and (2) the "freedom of association." In answering, it is convenient to do as appellants have done and treat the two together.

Over a long period of years the decisions of this court have had the effect of pricking out a line de-

fining the ambit of the First Amendment. In the 1890 case of *Davis v. Beason, supra*, the court upheld the constitutionality of an Idaho statute disenfranchising all persons who were members of any association that taught or advocated polygamy. At that time polygamy was an integral part of the doctrine of the Church of Jesus Christ of Latter-Day Saints. A short time later the court decided *Church of Jesus Christ of Latter-Day Saints v. United States, supra.* Here the court upheld the power of Congress to void an unlawful association (*e.g.*, the Church of Jesus Christ of Latter-Day Saints) and to confiscate its property. The thrust of both decisions is to allow a legislative body to restrict or penalize membership in an association if the association has unlawful aims.

In the case of *United Public Workers of America v. Mitchell, supra*, the court upheld the so-called "Hatch Act," which had the effect of forbidding employees of the federal government from taking an active part in political management or political campaigns. The reasoning of the court was that Congress had acted reasonably in deciding that political activities by government employees menace the integrity and competency of the civil service system. Appellees submit that the danger to be guarded against in the present case is of even greater magnitude. In the *Douds* case, *supra*, as has been previously mentioned in another connection, the court upheld the non-Communist affidavit provision of the

Taft-Hartley Act and refused the union's claim that the affidavit infringed upon their constitutional right not to speak. Appellees submit that the danger in the present case, to-wit: the danger of using the captive audience of the classroom as a subversive political outlet is as great an evil as the threat of a political strike, which was the concern of the court in the *Douds* case, *supra*.

In *Dennis v. United States*, *supra*, the court upheld the Smith Act, which made it a crime to conspire to advocate the overthrow of the government. In the *Dennis* case, *supra*, one of the indictments was for conspiracy to organize the Communist Party whose purpose was to advocate the forceable overthrow of the government. In upholding the case the court in effect ruled that it is proper for Congress to declare criminal the formation of an association of persons for political purposes, if such an association were to advocate the forceable overthrow of the government.

In the case of *Gerende v. Board of Supervisors of Elections*, *supra*, the court indicated that eligibility for elective office could be conditioned on the execution of a loyalty oath negating knowing membership in organizations engaged in an attempt to overthrow the government by force and violence.

In the *Garner* case, *supra*, the court upheld a 1941 Los Angeles charter amendment as implemented by a 1948 ordinance which required all city employees to, *inter alia*, take an oath that at present

or within the five preceding years they had not advocated the overthrow of the government by unlawful means or belonged to organizations with such objectives. In effect, the court held that if the public employee involved wished to continue his employment his right to silence, that is his right not to say what he does believe, would have to give way to the greater right of the public to minimize the number of subversive persons employed by the government. The interests to be balanced in the present case, at least as far as the First Amendment is concerned, are identical.

In *Adler v. Board of Education of the City of New York, supra*, the court upheld a statute which had the effect of barring persons from employment in the public schools who advocated or belonged to organizations which advocated the overthrow of the government by unlawful means. The court, on page 492, said:

> "* * * 'It is clear that such persons [employed or seeking employment in the public schools] have the right under our law to assemble, speak, think and believe as they will. * * * It is equally clear that they have no right to work for the State in the school system on their own terms. * * * If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not!' * * *
>
> "If, under the procedure set up in the New

> York law, a person is found to be unfit and is disqualified from employment in the public school system because of membership in a listed [subversive] organization, he is not thereby denied the right of free speech and assembly. His freedom of choice between membership in the organization and employment in the school system might be limited, but not his freedom of speech or assembly, except in the remote sense that limitation is inherent in every choice. Certainly such limitation is not one the state may not make in the exercise of its police power to protect the schools from pollution and thereby to defend its own existence."

The interests involved, at least as far as the First Amendment is concerned, are substantially the same in the present case.

In the recent case of *Speiser v. Randall*, 357 U. S. 513, the court struck down a California statute which conditioned the grant of a tax exemption on the filing of a loyalty affidavit. This case is significant for present purposes because the court distinguished cases in which some important governmental interest justified inquiry into loyalty despite its incidental effect on freedom of speech. Specifically, the court distinguished cases involving a particular group as opposed to the general public such as *Garner*, *Gerende*, and *Douds*, *supra*. This case would therefore not come under the rule of the *Speiser* case, *supra*.

In *Barenblatt v. United States*, 360 U. S. 109, the court again applied the relativistic concept of

the *Dennis* case, *supra*, and rejected Barenblatt's claim that he need not answer questions of the House Committee on Un-American Activities since it infringed on certain rights protected by the First Amendment. In balancing public and private interests, the court concluded that the field of education was not immune from all inquiry merely because of its importance to the free flow of ideas.

In *Uphaus v. Wyman*, 360 U. S. 72, the court more clearly defined the ambit of *Sweezy v. New Hampshire*, *supra*. In the *Uphaus* case, *supra*, the court affirmed the conviction of Mr. Uphaus on the ground that New Hampshire's interest in determining the presence of subversive persons outweighed Uphaus's interest in associational privacy.

Admittedly, an inquiry by a legislative body is not the same as an oath requirement; but in balancing the societal interest against the individual's interest the *Uphaus* and *Barenblatt* cases, *supra*, provide a guide in the present case.

— EVALUATION OF APPELLANTS' POSITION ON FIRST AMENDMENT

Before summarizing the effect of this entire line of cases, it is well to consider the portion of appellants' brief dealing with the First Amendment. *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, cited by appellants (Br. 33, 38, 39) is not applicable. For there, unlike here, the government program did not represent a public interest with a substantial value. There is a basic distinc-

tion between having a man state what he does believe, in order to be employed in a sensitive public position and, as in *Barnette*, *supra*, forcing a man to state what he did *not* believe. The same distinction can be made with regard to the California and Wisconsin cases on which appellants rely so heavily. In *Danskin v. San Diego Unified School District*, 28 Cal. (2d) 536, 171 P. (2d) 885 (1946), any interest of the government in limiting the use of school facilities to "non-subversive" organizations was outweighed by the First Amendment guarantee of assembly. This case is consonant with *Thomas v. Collins*, 323 U. S. 516, and *DeJonge v. Oregon*, 299 U. S. 353, neither of which is applicable here.

In *Lawson v. Housing Authority of the City of Milwaukee*, 270 Wis. 269, 70 N. W. (2d) 605 (1955), the state court struck down a law requiring tenants in public housing to take a loyalty oath that they were not members of organizations on the Attorney General's list.

Without belaboring the point, it should be apparent that the interest of the government is ever so much more substantial in not having present members of subversive organizations in sensitive positions than in merely preventing subversive persons from occupying dwellings in a public housing project.

Appellants state (Br. 40) that:

> "The oath in this case not only proscribes advocacy of forcible overthrow, but also advocacy or teaching the alteration of the constitutional form of the government * * * by revolution. * * *"

Appellants argue that the affidavit requirement comes within the ambit of the *Thornhill* case, *supra*, in that it abridges the First Amendment by proscribing advocacy of a basic change in our form of government not accompanied by force, violence or the use of unlawful means. Appellants show that one of the dictionary definitions of the word "revolution" is:

> "A fundamental change in political organization, or in a government or constitution." (Br. 40.)

Appellants claim that since the words are used in the disjunctive, the Washington legislature was not seeking to prevent a revolution by force and violence, but rather a basic change such as the industrial revolution.

In short, as a federal judge once said in another connection, appellants have reversed the usual procedure by troubling the waters in order to fish in them! That is, appellants have given the word "revolution" the least legally sound interpretation possible in order to have it struck down. It should be pointed out first of all that, although the word "revolution" is in the disjunctive, the words "force and violence" are also in the disjunctive. Hence, appellants' argument proves too much; for, following their argument, if there were force there could be no violence. In any event this court has held in *Fox v. Washington*, *supra*, that the court will assume that a statute will be interpreted by the highest state court in such a way as to avoid raising difficult constitutional prob-

lems where any other interpretation is possible. In this case appellants did not ask for the court below to interpret this phrase and they should not be permitted to take advantage of this and raise the question for the first time before this court.

C. Recapitulation of Appellees' Argument on the First Amendment

Certain generalizations may be made about the long line of cases which appellees have cited. Admittedly, the government could not, for example, compel a person to disclose whether he believed in God since the government could reveal no substantial reason justifying such a coerced disclosure. Yet it is equally certain that there are times when the government has a substantial interest in having an individual disclose what he believes. For example, it can hardly be denied that the government has a substantial reason for requiring an applicant for citizenship to reveal whether he believes in our system of government on pain of denying him such citizenship. The interest of the government is at least as substantial in knowing whether employees and officials occupying sensitive positions are knowingly and presently members of a subversive organization. It is not hyperbole to say that it would shake the confidence of the public in its government if the government were somehow prevented by the First Amendment from ascertaining whether those who manned its sensitive positions belonged to such an organization.

With regard to "freedom of association," although a state may not penalize innocent association, as shown in the *Wieman* case, *supra*, it may certainly protect itself against untrustworthy public servants.

Finally, the concept of academic freedom should be briefly examined. As Professor Roger C. Cramton pointed out in 43 Minn. L. Rev. 1076:

> "* * * the notion that talk between academicians is of a higher order—and thus entitled to greater constitutional protection—than the conversations of the general citizenry is surely a foolish one. 'Academic freedom' has high value as a guild argument of teachers as a profession against their employers and as a symbol of the scholar's ideal—the search for truth. But it has never been thought that the employers of teachers (*i.e.*, the trustees of private institutions and the responsible heads of public institutions) were precluded by the Constitution from inquiring as to what goes on in the classroom or in passing on a teacher's qualifications on the basis of his conduct, writings, beliefs or any other matter thought relevant to fitness."

CONCLUSION

The decision of the court below should be affirmed in all respects.

Respectfully submitted,

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APPENDIX

CHAPTER 254, LAWS OF WASHINGTON 1951

(This act is largely patterned after a Maryland Act, Ann. Code, 1951, Sec. 19; 1949, Ch. 86, Sec. 19, which was upheld by this court in the *Gerende* case, *supra.*)

Section 1. (RCW 9.81.010 (1) through (5).)

Definitions. For the purpose of this chapter:

"(a) 'Organization' means an organization, corporation, company, partnership, association, trust, foundation, fund, club, society, committee, association, political party, or any group of persons, whether or not incorporated, permanently or temporarily associated together for joint action or advancement of views on any subject or subjects.

"(b) 'Subversive organization' means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or of any political subdivision of either of them, by revolution, force or violence.

"(c) 'Foreign subversive organization' means any organization directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise, or teach, activities intended to overthrow, destroy

or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of the government of the United States, or of the state of Washington, or of any political subdivision of either of them, and to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization, or individual.

"(d) 'Foreign government' means the government of any country or nation other than the government of the United States of America or of one of the states thereof.

"(e) 'Subversive person' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or any political subdivision of either of them, by revolution, force, or violence; [or who is a member of a subversive organization or foreign subversive organization]." (Brackets supplied.)

(Section 1, chapter 254, Laws of 1951 was, except for subsection (e) defining "subversive person," reenacted in its entirety by § 1, chapter 142, Laws of 1953. Subsection (e) was amended to read as follows:

"(5) 'Subversive person' means any person who commits, attempts to commit, or aids

in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or any political subdivision of either of them, by revolution, force, or violence; *or who with knowledge that the organization is an organization as described in paragraphs two and three hereof, becomes or remains a member of a subversive organization or a foreign subversive organization.*" (Emphasis supplied.)

It is significant to note that the only change made in the definition of "subversive person" under the 1953 amendatory act was the substitution of the concluding clause italicized above for the concluding clause of the earlier definition, bracketed above. This change followed the decision of this court in *Wieman v. Updegraff*, *supra*.

Sec. 11 (RCW 9.81.060):

"No subversive person, as defined in this act, shall be eligible for employment in, or appointment to any office, or any position of trust or profit in the government, or in the administration of the business, of this state, or of any county, municipality, or other political subdivision of this state."

Sec. 12 (RCW 9.81.070):

"Every person and every board, commission, council, department, court or other agency of the state of Washington or any political sub-

division thereof, who or which appoints or employs or supervises in any manner the appointment or employment of public officials or employees shall establish by rules, regulations or otherwise, procedures designed to ascertain whether any person is a subversive person. In securing any facts necessary to ascertain the information herein required, the applicant shall be required to sign a written statement containing answers to such inquiries as may be material, which statement shall contain notice that it is subject to the penalties of perjury."

(This section amended by § 1, chapter 377, Laws of 1955, *infra.*)

Sec. 13 (RCW 9.81.080):

"The inquiries prescribed in preceding sections, other than the written statement to be executed by an applicant for employment, shall not be required as a prerequisite to the employment of any persons in any case in which the employing authority may determine, and by rule or regulation specify the reasons why, the nature of the work to be performed is such that employment of such persons will not be dangerous to the health of the citizens or the security of the governments of the United States, the state of Washington, or any political subdivision thereof."

(This section amended by § 2, chapter 377, Laws of 1955, *infra.*)

Sec. 14 (not codified):

"Every person who, on June 1, 1951, shall be in the employ of the state of Washington or of

any political subdivision thereof, other than those now holding elective office shall be required on or before July 1, 1951, to make a written statement which shall contain notice that it is subject to the penalties of perjury, that he or she is not a subversive person as defined in this act; namely, any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or any political subdivision of either of them, by revolution, force or violence; or who is a member of a subversive organization or a foreign subversive organization, as more fully defined in this act. Such statements shall be prepared and execution required of and by every person and every board, commission, council, code department, court or other agency of the state of Washington or any subdivision thereof responsible for the supervision of other employees, for the employees under the jurisdiction thereof. Any such person failing or refusing to execute such a statement or who admits he is a subversive person as defined in this act shall immediately be discharged."

Sec. 15 (RCW 9.81.090):

"Reasonable grounds on all the evidence to believe that any person is a subversive person, as defined in this act, shall be cause for discharge

from any appointive office or other position of profit or trust in the government of or in the administration of the business of this state, or of any county, municipality or other political subdivision of this state, or any agency thereof. The attorney general and the personnel director, and the civil service commission of any county, city or other political subdivision of this state, shall, by appropriate rule or regulations, prescribe that persons charged with being subversive persons, as defined in this act, shall have the right of reasonable notice, date, time and place of hearing, opportunity to be heard by himself and witnesses on his behalf, to be represented by counsel, to be confronted by witnesses against him, the right to cross-examination, and such other rights which are in accordance with the procedures prescribed by law for the discharge of such person for other reasons. Every person and every board, commission, council, department, or other agency of the state of Washington or any political subdivision thereof having responsibility for the appointment, employment or supervision of public employees not covered by the classified service in this section referred to, shall establish rules or procedures similar to those required herein for classified services for a hearing for any person charged with being a subversive person, as defined in this act, after notice and opportunity to be heard. Every employing authority discharging any person pursuant to any provision of this act, shall promptly report to the special assistant attorney general in charge of subversive activities the fact of and the circumstances surround-

ing such discharge. Any person discharged under the provisions of this act shall have the right within thirty days thereafter to appeal to the superior court of the county wherein said person may reside or wherein he may have been employed for determination by said court as to whether or not the discharge appealed from was justified under the provisions of this act. The court shall regularly hear and determine such appeals and the decision of the superior court may be appealed to the supreme court of the state of Washington as in civil cases. Any person appealing to the superior court may be entitled to trial by jury if he or she so elects."

Sec. 17 (RCW 9.81.110):

"Every written statement made pursuant to this act by an applicant for appointment or employment, or by any employee, shall be deemed to have been made under oath if it contains a declaration preceding the signature of the maker to the effect that it is made under the penalties of perjury. Any person who wilfully makes a material misstatement of fact (a) in any such written statement, or (b) in any affidavit made pursuant to the provisions of this act, or (c) under oath in any hearing conducted by any agency of the state, or of any of its political subdivisions pursuant to this act, or (d) in any written statement by an applicant for appointment or employment or by an employee in any state aid or private institution of learning in this state, intended to determine whether or not such applicant or employee is a subversive person as defined in this act, which statement

contains notice that it is subject to the penalties of perjury, shall be subject to the penalties of perjury, as prescribed in chapter 9.72, RCW."

CHAPTER 377, LAWS OF WASHINGTON 1955

(This act is amendatory of chapter 254, Laws of 1951. It amended two sections (12 and 13 quoted *supra*) and added two additional sections.)

Section 1 (amending § 12, *supra*):

"Every person and every board, commission, council, department, court or other agency of the state of Washington or any political subdivision thereof, who or which appoints or employs or supervises in any manner the appointment or employment of public officials or employees shall establish by rules, regulations or otherwise, procedures designed to ascertain whether any person is a subversive person. In securing any facts necessary to ascertain the information herein required, the applicant shall be required to sign a written statement containing answers to such inquiries as may be material, which statement shall contain notice that it is subject to the penalties of perjury. Every such person, board, commission, council, department, court, or other agency shall require every employee or applicant for employment to state under oath whether or not he or she is a member of the communist party or other subversive organization, and refusal to answer on any grounds shall be cause for immediate termination of such employee's employment or for refusal to accept his or her application for employment."

Sec. 2 (amending § 13, *supra*):

"The inquiries prescribed in preceding sections, other than the written statement to be executed by an applicant for employment and the requirement set forth in section 1 of this amendatory act, relative to membership in the communist party or other subversive organization, shall not be required as a prerequisite to the employment of any persons in any case in which the employing authority may determine, and by rule or regulation specify the reasons why, the nature of the work to be performed is such that employment of such persons will not be dangerous to the health of the citizens or the security of the governments of the United States, the state of Washington, or any political subdivision thereof."

Sec. 3 (additional):

"For the purpose of this act, membership in a subversive organization shall be membership in any organization after it has been placed on the list of organizations designated by the attorney general of the United States as being subversive pursuant to executive order No. 9835."

(This section was held unconstitutional by the Supreme Court of Washington in the instant case and is not, therefore, before this court for review.)

Sec. 4 (additional):

"The communist party is a subversive organization within the purview of RCW 9.81 and membership in the communist party is a subversive activity thereunder."